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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-691

INDIANAPOLIS POWER & LIGHT COMPANY AND INDIANAPOLIS CHAMBER OF COMMERCE INC.,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JERRY P. BELKNAP,
BRYAN G. TABLER,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Telephone: (317) 638-1313,
Attorneys for Petitioners.

MARCUS E. WOODS,
ARNOLD A. GORDUS,
Indianapolis Power & Light Company,
Post Office Box 1595B,
Indianapolis, Indiana 46206,
Telephone: (317) 261-8261,

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Telephone: (317) 638-1313,
Of Counsel.

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UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Indianapolis Power & Light Company and Indianapolis Chamber of Commerce, Inc. pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

ORDERS AND OPINIONS BELOW

The opinion of the Court of Appeals in *Indianapolis Power & Light Company and Indianapolis Chamber of Commerce, Inc.* v. *U. S. Environmental Protection Agency* is not officially reported but is reprinted in the Appendix at pages A2-A11 and

is unofficially reported at 13 ERC 1461. The same court's opinion in the related cases of *United States Steel Corporation and Youngstown Sheet and Tube Company* v. *U. S. EPA* is not yet reported but is in the Appendix at pages A12-A31.

The order of the United States Environmental Protection Agency ("EPA") reviewed by the Seventh Circuit appears at 43 Fed. Reg. 8962 (March 3, 1978) and is reprinted in the Appendix at A52-A64.

JURISDICTION

The judgment of the Court of Appeals (Appendix, A1) was entered on August 2, 1979. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Pursuant to its obligation under § 107 of the Clean Air Act to designate areas which do not meet national air quality standards, EPA promulgated a list of designations submitted by an Indiana agency, which list an appropriate Indiana court adjudicated to have been unlawfully issued without compliance with requirements of notice and hearing mandated by Indiana law. In addition, EPA made the designation immediately effective, dispensing with publication of proposed rulemaking and acceptance of prior public comments. The Court of Appeals for the Seventh Circuit held that neither it nor EPA need honor the decision of the Indiana court. It also ruled that EPA's procedure was justified under "good cause" exemptions in 5 U. S. C. § 553 and that judicial review thereof was limited by 42 U. S. C. § 7607(d)(9). The questions presented for review are:

1. Whether, despite the full faith and credit mandate of 28 U. S. C. § 1738, the principle of collateral estoppel by judgment, and the system of cooperative federalism ordained in the Clean Air Act, the Seventh Circuit properly affirmed EPA's promulgation of an area classification

list submitted by the Indiana agency pursuant to Clean Air Act Section 107(d), when there was a final judgment from an Indiana court of general jurisdiction holding the submitted list to be void as an act of the State for noncompliance with Indiana law requirements of notice and hearing.

2. Whether the failure of EPA to comply with the Administrative Procedure Act requirements for notice and comments prior to rulemaking was excused, contrary to decisions of the United States Court of Appeals for the Third and Fifth Circuits, by the "good cause" of statutory deadlines and self-imposed delay, where EPA had by statute 60 days following submission to EPA by the states of suggested designations to promulgate designations of the attainment status of various areas under the Clean Air Act.

3. Whether the limitations on judicial review of procedural defects in EPA rulemaking set forth in 42 U. S. C. § 7607(d)(9) are applicable to rulemaking procedures which Congress omitted from the enumeration in 42 U. S. C. § 7607(d)(1) of those proceedings to which the subsection applies.

Question 1 above is presented in this Petition only. Questions 2 and 3 are also presented in the Petition in No. 79-486, *United States Steel Corporation and Youngstown Sheet and Tube Company* v. *U. S. EPA*.

STATUTES INVOLVED

The provisions of the Clean Air Act, 42 U. S. C. § 7401 *et seq.*, primarily involved herein, §§ 7407, 7409, 7410, 7501, 7502, and 7607, are set forth at Appendix, A77-A106.

The relevant portions of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, §§ 553 and 706, are set forth at Appendix, A74-A76.

28 U. S. C. § 1738 is set forth at Appendix, A76. 28 U. S. C. § 1652 is set forth at Appendix, A76-A77.

Pertinent provisions of the Indiana rulemaking statute, IC 4-22-2-1 *et seq.*, are set forth at Appendix, A106-A111.

STATEMENT OF THE CASE

The Clean Air Act Amendments of 1977 (P. L. 95-95, 91 Stat. 685 (August 7, 1977)), require a combined state-federal effort to classify each area of the country as to whether its air quality meets the national ambient air quality standards. Section 107(d)(1) of the Act, 42 U. S. C. § 7407(d)(1), directs each State to submit to EPA, within 120 days of enactment of the 1977 Amendments, a list of those areas of the State that as of August 7, 1977, did not meet a national ambient air quality standard, a list of those areas with air quality better than required by the national standards on that date, and a list of those areas which cannot be classified for lack of information. Section 107(d)(2) requires EPA, within 60 days of receiving a State's list of designations, to promulgate it, or after further proceedings, to promulgate it with modifications deemed necessary. Designation of an area as nonattainment triggers imposition of severe constraints on sources located or planning to locate in that area. 42 U. S. C. §§ 7502-7508.

On December 2, 1977, and January 17, 1978, staff members of the Indiana Air Pollution Control Division submitted to EPA a list of recommended attainment status designations for the entire State. Both submissions proposed that Marion County be classified nonattainment for sulfur dioxide. On March 3, 1978, without providing prior public notice or opportunity for public comment, the EPA Administrator published as final, immediately effective rules a list of Section 107 designations for the entire United States. 40 C. F. R. Part 81. Marion County was classified nonattainment for sulfur dioxide. (40 C. F. R. § 81.315, Appendix, A63.) The Administrator invited *post hoc*

public comments by May 2, 1978, which was also the last date for filing a petition for judicial review of the rule. 42 U. S. C. § 7607(b)(1).

On April 28, 1978, Indianapolis Power & Light Company, which operates sulfur dioxide-emitting generating stations in Marion County, petitioned the Court of Appeals for the Seventh Circuit to review and set aside EPA's March 3, 1978, final regulation designating Marion County as nonattainment for sulfur dioxide. Indianapolis Chamber of Commerce, Inc. was later granted leave to intervene as a petitioner. Jurisdiction in the Court of Appeals was founded upon 42 U. S. C. § 7607(b).

On October 5, 1978, while the review petition was pending, EPA republished the classification at issue, stating that the evidence supported a finding that the air quality in Marion County was not in compliance with the national primary ambient standard for sulfur dioxide. (Appendix, A65-A73.)

In the Court of Appeals, Petitioners assailed EPA's classification of Marion County as nonattainment on three grounds. First, Petitioners pointed out that the rule should be set aside as being without basis and as issued otherwise than in accordance with law, because the Indiana documents relied upon by EPA as the sole basis for the rule were not promulgated in accordance with the Indiana rulemaking statute, IC 4-22-2-1 *et seq.*, were accordingly void as utterances of the State, and could not be adopted by EPA as State action under Clean Air Act Section 107(d). Second, Petitioners contended that the March 3, 1978, classification should be set aside as violating the prior notice and comment requirements of 5 U. S. C. § 553. Third, Petitioners maintained that EPA's classification of Marion County as nonattainment was not the product of reasoned decisionmaking.

The Court of Appeals heard argument on Petitioners' case on April 18, 1979, together with argument on petitions filed by United States Steel Corporation and Youngstown Sheet and Tube Company to review EPA's contemporaneous designation of part of Lake County, Indiana, as nonattainment.

Concurrently, as was noted in the briefs of both Petitioners and Respondent below, Petitioners challenged in State court the Indiana Air Pollution Control Board's transmittal of the classifications for noncompliance with State rulemaking procedures. On May 6, 1979, the Circuit Court of Hancock County, Indiana, rendered a final judgment in that suit. Sustaining Petitioners' interpretation of State law, the State court declared the classification list submitted to and adopted by EPA "absolutely void and of no effect as an act of the State of Indiana or for any other purpose," and enjoined State officials from taking or withholding any action premised on Marion County's having been duly designated a nonattainment area. (Appendix, A32.) Pursuant to the Court of Appeals' request at oral argument, Petitioners advised it of the State court judgment on May 15, 1979, by submitting as additional authority both the State court's judgment and its detailed findings of fact and conclusions of law. (Appendix, A35-A51.)

On August 1, 1979, the Court of Appeals issued an opinion denying the petitions of United States Steel Corporation and Youngstown Sheet and Tube Company to set aside EPA's Lake County nonattainment designation. (Appendix, A12.) The court held that the agency had "good cause" to dispense with proposed rulemaking and prior public comment under 5 U. S. C. §§ 553(b)(B) and 553(d)(3). As an alternative ground of decision, the court ruled that Clean Air Act Section 307(d)(9), 42 U. S. C. § 7607(d)(9), which restricts reversal of EPA rulemaking for procedural errors, applied and mandated affirmance.

On August 2, 1979, the Court of Appeals issued an unsigned Order rejecting Petitioners' challenges to EPA's March 3, 1978, classification of Marion County. (Appendix, A2.) Citing its day-old opinion in *United States Steel, et al.* v. *EPA*, the court summarily dismissed Petitioners' contention that EPA's March 3, 1978, regulations were adopted in contravention of the Administrative Procedure Act. The court then rejected Petitioners'

position that the Indiana Air Pollution Control Board's attainment status designations were invalid under State law. In the first place, the court ruled, this contention was waived by Petitioners' failure to raise it during the comment period, which began *after* EPA's promulgation of the final rules and coincided with the time for seeking judicial review thereof. Secondly, the Court of Appeals declined to respect the decision of the Circuit Court of Hancock County, stating that as "a decision of a *nisi prius* court, it is not binding on us . . . unless the decision is affirmed on appeal," and opining that the State court's interpretation of the State rulemaking statute was doubtful. Lastly, the court ruled that Section 107(d) of the Clean Air Act does not authorize the Administrator to disapprove attainment status designations submitted to him merely because the State authorities "may not have complied strictly with state procedural requirements." (Appendix, A6-A7.)

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals' Disregard of a Valid State Court Judgment Conflicts with Applicable Decisions of This Court, with 28 U. S. C. § 1738, and with the Principles of Collateral Estoppel. If Allowed to Stand, It Will Drastically Reorder the System of Cooperative Federalism Established by the Clean Air Act.

By choosing to ignore the final judgment of the Indiana court, the Court of Appeals has violated the express mandates of 28 U. S. C. § 1738 (1976) and this Court, both of which require federal courts to give final judgments of State courts full faith and credit. In addition, in rendering its decision, the Court of Appeals disregarded the state-federal division of jurisdiction provided by Congress in the Clean Air Act and articulated by this Court in *Union Electric Co.* v. *EPA*, 427 U. S. 246 (1976). Petitioners were thereby denied any effective review of the

EPA's nonattainment designation and were denied the important State law remedies expressly reserved to them in *Union Electric, supra.*

This Court has had occasion to construe the Clean Air Amendments of 1970 (P. L. 91-604, 84 Stat. 1676 (December 31, 1970)). *E.g., Union Electric Co., supra; Train* v. *Natural Resources Defense Council,* 421 U. S. 60 (1975). The heart of the 1970 Amendments, this Court has held, is the requirement that each State formulate a plan to achieve federally established air quality standards. Under Section 110(a)(2) of the Act, the EPA Administrator is required to approve a State plan which provides for the timely attainment of national air quality standards and which satisfies that section's other specifically enumerated requirements. *Union Electric Co., supra,* at 250, 256, 265.

Applying this principle, this Court held in *Union Electric* that the Administrator lacks authority to disapprove a State-submitted plan on the ground that compliance therewith would be economically or technologically infeasible or on any ground except the plan's failure to meet the specific criteria set forth in Section 110(a)(2)(A)-(H). Since matters extraneous to those criteria cannot be considered by the Administrator in exercising his approval authority, this Court held that neither may a federal court of appeals consider such matters in exercising its Section 307(b) reviewing authority. *Union Electric,* at 256, 265-66. Rather, "sources objecting to such a[n infeasible] state scheme must seek their relief from the State." *Union Electric,* at 265 n. 14. If State law permits, a source may "take its claims of economic or technological infeasibility to the state courts." *Union Electric,* at 266-67.

This Court has thus construed the congressional scheme as giving the State courts the ultimate authority to determine the validity of the State action to be approved or acted upon by the Administrator. In the case at bar, Petitioners properly availed themselves of the State law remedies stressed by the Court in *Union Electric* as the *only* available remedies. But the Court of

Appeals wholly eviscerated that remedy by denying full faith and credit to the State court judgment on the lawfulness of the State's portion of the joint state-federal effort called for by the Clean Air Act. Indeed, the Court of Appeals went even further. After deciding that the Administrator has no authority under Section 107(d) to disapprove a purportedly official State submittal because it might be void under State law, the lower court proceeded itself to consider the State law question and to decide it, without mentioning any reason grounded in State law, squarely contrary to a final State court judgment on the precise issue.[1] (Appendix, A7 n. 4).

The result is a situation which neither the scheme of the Clean Air Act nor constitutional federalism can tolerate: The Court of Appeals has upheld EPA's promulgation of an Indiana classification which should serve as the basic premise of Clean Air Act Implementation Plan provisions to be developed by the State, while the State court has held the classification invalid and has enjoined State officials from acting upon the classification.

Clearly, the mechanism of state-federal cooperation articulated in *Union Electric* and *Train* v. *NRDC, supra,* cannot operate without regard for the full faith and credit requirement of 28 U. S. C. § 1738. That statute commands federal courts to accord a State court judgment the same full faith and credit—the same collateral estoppel effect—it merits in the rendering

1. As noted in the Statement of the Case, the Court of Appeals also stated that Petitioners' attack on the procedures followed by the State board "comes too late" since this point was not raised with EPA. (Appendix, A6.) At this juncture, the court may have nodded. Petitioners were, after all, challenging a *final,* immediately effective rule and were also challenging EPA's failure to give any notice or accept any comments before making the rule effective. The court may have been referring to the opportunity for comment EPA allowed *after* the designation became effective, but at this point the chance for meaningful dialogue had passed. Further, it should be noted that the Court of Appeals' unprecedented "waiver" theory is inconsistent with its view that EPA has no authority to consider State law objections to State submisions. If this extraordinary forfeiture theory is to be the law in notice and comment rulemaking, it should be this Court that says so.

State. *Durfee* v. *Duke*, 375 U. S. 106 (1963). Here a State court of general jurisdiction[2] reviewed the record purported to constitute a solemn, official act of the State, found it instead merely to reflect the unauthorized action of errant State employees, and declared it void as an act of the State. The Court of Appeals, reviewing less than the whole record, held the same act to be cognizable as official State action. The mandate of full faith and credit at 28 U. S. C. § 1738 does not countenance this denigration of State judicial proceedings, and the delicately balanced division of State and federal responsibilities Congress set up in the Clean Air Act cannot tolerate such a disregard for the laws and judicial proceedings of the States.

The collateral-estoppel-by-judgment rule has been equally violated. This Court recently applied the doctrine of collateral estoppel to bar a party from relitigating issues decided against it in a prior suit against a federal agency not a party to the second action. In *Parklane Hosiery, Inc.* v. *Shore*, 47 U. S. L. W. 4079 (Jan. 9, 1979), at 4080-81, n. 5, the Court described collateral estoppel and the related doctrine of res judicata as follows:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

In *Montana* v. *United States*, 47 U. S. L. W. 4190 (Feb. 22, 1979), the Court held the U. S. Government collaterally estopped from relitigating in federal court a question decided adversely to its privy in a prior State court judgment.

The same principles apply in the case at bar, and the decision below conflicts with them. Here the issue whether the classification adopted by EPA as Indiana action in fact constituted valid State action was actually litigated and decided in the State court and was necessary to the outcome there since it was the only thing at issue. (Appendix, A35-A51.) *Parklane Hosiery, Inc., supra*, and *Montana* v. *United States, supra*, bar not only the State court defendant but also its privies from relitigating the issue in federal court. On March 3, 1978, EPA uncritically adopted and promulgated a purported State classification without seeking or even giving opportunity for submittal of other information on the subject. Accordingly, the question whether the underlying papers were duly submitted by the State or by someone else is at once fundamental to the validity of EPA's action and a pure matter of State law upon which EPA, as the mere recipient of the papers, can shed no light not already cast by the responsible State officials and the State Attorney General, whose task it was to defend in State court the validity of the classification transmitted to and adopted by EPA. In these circumstances, binding EPA to the State court judgment is proper because its legal interests are entirely congruent with the State agency's interests. *Southwest Airlines Co.* v. *Texas International Airlines*, 546 F. 2d 84, 91-101 (5th Cir.), *cert. denied*, 434 U. S. 832 (1977); *cf. Consumers Union of the United States* v. *Consumer Product Safety Commission*, 590 F. 2d 1209, 1217-23 (D. C. Cir. 1978), *cert. granted*, 47 U. S. L. W. 3747 (May 14, 1979). Indeed, under the Clean Air Act, EPA has no independent legal interest in State-submitted attainment designations or implementation plans. EPA gets what it gets from the State, however flawed or deficient. *Union Electric Co., supra* at 266-67; *Train* v. *NRDC, supra* at 79; *Indiana & Michigan Electric Co.* v. *EPA*, 509 F. 2d 839, 847 (7th Cir. 1975). Accordingly, EPA's purely derivative interest must be concluded by the State court judgment. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, 593-95 (1974). EPA may have been at liberty to take steps to make attainment status designations for Indiana in the face of the State's failure timely

2. The Hancock Circuit Court is such a court. See *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 414 (1923); IC 33-4-4-3.

to perform its task of recommending designations. *See* 42 U. S. C. § 7410(c). However, it was not free, nor was the Court of Appeals free, to determine on its own the validity of the submission as a legal act of the State of Indiana. This Court should grant the writ to make unmistakably clear what is fairly implicit in *Union Electric*—that derivative interests of federal agencies in State administrative proceedings are necessarily concluded in State court proceedings involving their State level counterparts.

The Court of Appeals offered only cursory justification for its disregard of the State court judgment. Citing this Court's decision in *Commissioner* v. *Estate of Bosch,* 387 U. S. 456 (1967), the court below remarked that "[b]eing a decision of a *nisi prius* court, [the state court judgment] is not binding on us . . . unless the decision is affirmed on appeal." (Appendix, A7.)

This completely misses the point. The Court of Appeals was not deciding a question of State law as it would in a diversity action;[3] it should have been considering the effect of a State court judgment. Under Indiana law, the judgment of the Circuit Court of Hancock County was final and the possibility of an appeal in no way changed the situation. Until annulled or reversed on appeal, that judgment is binding upon the parties as

3. Even if some strained logic could furnish a reason for the Court of Appeals to have reconsidered the State law question settled by the Hancock Circuit Court, *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169 (1940), *Commissioner* v. *Estate of Bosch,* 387 U. S. 456, 465 (1967) itself, and 28 U. S. C. § 1652 all provide that the opinion of a State trial court must be respected by a federal court unless other persuasive State law data convinces the court that the highest court of the State would decide otherwise. The Court of Appeals looked to no such data; instead it decided the Indiana statutory question solely by reference to this Court's opinion in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402 (1971), which is quite irrelevant to Indiana law because it is based on the Federal Administrative Procedure Act, which differs from the Indiana Act in defining a "rule" subject to rulemaking procedure. IC 4-22-2-3 says that a rule includes "any classification . . . designed to have or having the effect of law or interpreting, supplementing or implementing any statute." Area classifications implementing the Clean Air Act cannot by any stretch escape this definition.

to every question directly decided. *Nill* v. *Comparet,* 16 Ind. 107, 109 (1861). Full faith and credit requires that it be given the same effect here.

Application of the principle of collateral estoppel leads to the same conclusion. As this Court stated in *Deposit Bank* v. *Board of Councilmen of Frankfort,* 191 U. S. 499 (1903):

> "It is urged that the state judgment upon which the Federal decree of 1808 is based was afterwards reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed, and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed, based upon a former judgment between the parties, *the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself;* was it within the jurisdiction of the court between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied a settlement of the rights of the parties. * * * We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force." (191 U. S. 510-511.) (Emphasis added.)

This holding was approved in *Huron Holding Corp.* v. *Lincoln Mine Operating Co.,* 312 U. S. 183, 189 (1941).

II

The Court Below Has Interpreted 42 U. S. C. § 7607(d) and the "Good Cause" Exceptions to the Notice and Comment Procedures of 5 U. S. C. § 553, Questions of Central Importance to the Administration of the Clean Air Act, in a Way That Directly Conflicts with Decisions Rendered Upon Nearly Identical Facts by the Courts of Appeals for the Third and Fifth Circuits.

The court below ruled that tight statutory deadlines and the States' need for immediate guidance in the preparation of implementation plans gave EPA "good cause" to dispense with the notice and comment requirements of 5 U. S. C. § 553. This question is of immense importance to administration of the Clean Air Act and other statutes that prescribe deadlines for agency action.

The court below also ruled that the limitations on judicial review of agency rulemaking contained in 42 U. S. C. § 7607 (d)(9) apply even though the rulemaking at issue here is without the scope of 42 U. S. C. § 7607(d). This *tour de force* unsettles the rulemaking procedures of the Clean Air Act.

These rulings both conflict directly with the decisions in *Sharon Steel Corporation* v. *Environmental Protection Agency*, 597 F. 2d 377 (3d Cir. 1979) and *United States Steel Corporation* v. *United States Environmental Protection Agency*, 595 F. 2d 207 (5th Cir. 1979).

As noted above, these important rulings first were announced by the court below in its opinion in *United States Steel Corporation and Youngstown Sheet and Tube Company* v. *United States Environmental Protection Agency*, (Appendix, A12), and were applied in the present case simply by reference to that decision. United States Steel Corporation and Youngstown Sheet and Tube Company have petitioned this Court to issue a writ of certiorari to review these rulings. *United States Steel Corporation*

v. *United States Environmental Protection Agency*, No. 79-486 (petition filed September 21, 1979). Their petition ably explicates the reasons why this Court should review these questions. To spare the Court needless repetition, Petitioners hereby incorporate by reference pages 8-19 of that petition. R. Stern & E. Gressman, SUPREME COURT PRACTICE 448 (5th Ed. 1978).

CONCLUSION

The Court of Appeals below decided two questions important to administration of the Clean Air Act in conflict with Third and Fifth Circuit decisions. The Court of Appeals also sought to redetermine the validity of State action on which the agency order involved was founded, in the face of a State court judgment holding the action invalid for want of notice and hearing required by State law.

The questions raised by the decision below are of both immediate and continuing importance. In Indiana alone there are 460 separate entries (ninety-two areas times five pollutants) on the classification lists called for by Section 107(d). Since the Section 107 classification process is a continuing one, 42 U. S. C. § 7407(d)(5), the questions raised herein are likely to recur again and again within Indiana and the rest of the Seventh Circuit. Moreover, the decision below raises serious questions pertinent to the process of state implementation plan development, approval, and judicial review under the Clean Air Act. The Clean Air Act Amendments of 1977 require wholesale revisions of the State plans on a nationwide basis. The process is nearing conclusion, with EPA continually issuing approvals, disapprovals, and conditional approvals. It is fair to expect State courts and federal appeals courts to receive a virtual deluge of review petitions within the near future. The decision below has unsettled the law applicable to these proceedings in the Seventh Circuit—made it different from the law in the Third and Fifth Circuits—and the guidance of this Court is urgently needed.

The writ should accordingly be granted to resolve the conflict among the Circuits, to dispel uncertainties in an important area of the law, and to compel proper recognition of the function of the State in administration of the Clean Air Act.

Respectfully submitted,

JERRY P. BELKNAP,
BRYAN G. TABLER,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Telephone: (317) 638-1313,
Attorneys for Petitioners.

MARCUS E. WOODS,
ARNOLD A. GORDUS,
Indianapolis Power & Light Company,
Post Office Box 1595B,
Indianapolis, Indiana 46206,
Telephone: (317) 261-8261,

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Telephone: (317) 638-1313,
Of Counsel.

APPENDIX.

Unpublished Per Curiam Order
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 2, 1979

Before

Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

INDIANAPOLIS POWER & LIGHT COMPANY, *Petitioner,* INDIANAPOLIS CHAMBER OF COMMERCE, INC., *Intervenor,* No. 78-1555 *vs.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*	Petition for Enforcement of an Order of the United States Environmental Protection Agency.

This cause came on to be heard on the transcript of the record from the United States Environmental Protection Agency, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the United States Environmental Protection Agency in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

UNITED STATES COURT OF APPEALS

Unpublished Order Not to Be Cited per Circuit Rule 35

For the Seventh Circuit
Chicago, Illinois 60604

Argued April 18, 1979
Decided August 2, 1979

Before

Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

INDIANAPOLIS POWER & LIGHT COMPANY AND INDIANAPOLIS CHAMBER OF COMMERCE, INC.,
Petitioners,

No. 78-1555 *vs.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of an Order of the United States Environmental Protection Agency.

ORDER

On March 3, 1978, the Administrator of the Environmental Protection Agency approved the determination of the State of Indiana that air quality in Marion County, Indiana, did not meet the standards required by the Clean Air Act (42 U. S. C. § 7401 *et seq.*) because of concentration of sulfur dioxide (Pet. App. A1, A5). On October 5, 1978, he again designated Marion County as a nonattainment area for the primary sulfur dioxide standard. At the same time he reclassified Marion County as attainment for the secondary sulfur dioxide standard.[1] (EPA App. B1, B4.)

1. For sulfur dioxide, the pollutant involved in this case, the EPA regulations establish a primary annual standard at 80 micro-

(Footnote continued on next page.)

Petitioners have challenged the designation principally on the ground that it was based on an illegal Indiana classification. Most of the other grounds raised by petitioners in their attack on the EPA's designation were rejected in the recent cases of *United States Steel Corporation* v. *United States Environmental Protection Agency*, 7th Cir. Nos. 78-1563 and 1564, and *Oscar Mayer and Company, Inc.* v. *Costle*, 7th Cir. No. 78-1548, decided by this Court by opinion of July ....., 1979, and order of July ....., 1979, respectively. We affirm the decisions of the Administrator.

Proceedings of Indiana Air Pollution Control Board Support Nonattainment Designation.

The statutory scheme was fully described in our aforementioned opinion and order and will not be redescribed herein. When the Administrator published the attainment status designation for the entire Marion County on March 3, 1978, he was adopting the recommendation of the Indiana Air Pollution Control Board (see Pet. App. A3). This is the board designated by the Indiana legislature as the air pollution agency for the state for all purposes of the federal Clean Air Act. Indiana Code 13-7-2-10. Therefore, under Section 107(c) of the Clean Air Act (42 U. S. C. 7447(c)) it was the "appropriate State authority" for the EPA Administrator to consult before making his designation.[2] On December 2, 1977, Harry D. Williams, the Director of the Air Pollution Control Division of the Indiana State Board of Health sent the EPA a November 23, 1977, Draft Support Document (Pet. App. A25-A34) with respect to nonattainment areas in Indiana (Pet. App. A24). This showed a

(Footnote continued from preceding page.)

grams per cubic meter and a primary maximum 24-hour concentration standard of 365 micrograms per cubic meter (40 C. F. R. 50.4). The secondary standard is not involved in this petition for review.

2. In their reply brief petitioners concede that the Indiana Air Pollution Control Board is "the legitimate Indiana authority" to make designation recommendations to the EPA (Reply Br. 9).

nonattainment sulfur dioxide designation for Marion County (Pet. App. A27, A32). This Draft Support Document was formally submitted to an EPA Regional official in Chicago by Ralph C. Pickard, Technical Secretary of the Pollution Control Board of Indiana on December 5, 1977 (Pet. App. A24, A106).

On January 17, 1978, Mr. Pickard sent a copy of a more detailed Support Document (Pet. App. A36-A102) to EPA Regional Administrator Alexander. Mr. Pickard noted that the prior recommended designations had not been amended but that "the order of discussion of the specific counties and supporting data differs slightly from the original submittal." (Pet. App. A106; EPA Br. Exhibits 1-2). Another enclosure or list entitled "Proposed Indiana Nonattainment Areas" stated that "Preliminary modeling studies were utilized to designate * * * Marion [County] as [a] nonattainment region in accordance with U. S. EPA guidelines" (Pet. App. 106, 107, 109). On January 23, 1978, EPA Region V submitted a report to EPA officials designating attainment and nonattainment areas in its six-state region. This report also showed that Marion County's sulfur dioxide exceeded both EPA's primary and secondary standards (Pet. App. A110, A114).

Mr. Williams' December 2, 1977, submittal of the November 23, 1977, Draft Support Document was ratified by the Indiana Air Pollution Control Board on December 14, 1977 (Pet. App. A103), and the Board reconfirmed its approval of the January 17 version of the Support Document on January 25, 1978, after a public hearing thereon. As the Technical Secretary of the Board stated, the Support Document submitted on January 17 differed from the earlier submission that it designated Jefferson County as attainment rather than nonattainment of sulfur dioxide. Also on January 25, in order to put EPA on notice of its concerns, the Board adopted a motion that Marion County be listed as unclassifiable for sulfur dioxide but nevertheless did not change the previous recommendations that it be designated

as nonattainment. The letter describing this action stated that the Board's staff would present its concerns to the EPA during the public comment period following EPA's publication of the nonattainment designations (Pet. App. A120-121.)

At a February 22, 1978, meeting the Indiana Air Pollution Control Board adopted a motion requesting the EPA to advise the Board whether it could modify the January 17 Support Document or could recall it (Pet. App. A122). Two days later the EPA advised the Board that since the EPA Administrator had already signed the nonattainment area designations nationwide [on February 23] any modification or recall with respect to Indiana's January 17 submittal would require Indiana to submit additional technical information during the 60-day public comment period following the March 3, 1978, promulgation of a nationwide attainment status, or would require Indiana to formally petition for redesignation pursuant to Section 107(d)(5) of the Clean Air Act (42 U. S. C. § 7407(d)(5)) and simultaneously submit sufficient technical support to justify a repromulgation (Pet. App. A123).

On March 9, 1978, the Board wrote the EPA that on January 25 the Board had adopted the nonattainment area designations and Support Document submitted to the EPA on January 17 by Technical Secretary Pickard. The letter also stated that at its February 22 meeting, the Board moved to change Marion County from nonattainment sulfur dioxide to unclassified even though the enclosed supplemental Support Document had only recommended modifying slightly the boundaries of the nonattainment designation area for Marion County and even though there was no support in the technical documents for designating Marion County as unclassified. (EPA App. B54 and EPA Br. 10.)

On June 12, 1978, Technical Secretary Pickard wrote the EPA that at its March 22 meeting the Board "reaffirmed its March 9 comment that Marion County [sulfur dioxide] should be changed from nonattainment to unclassified." However,

Pickard added that the Board was not petitioning EPA to make this change "since Air Pollution Control Division staff cannot provide adequate technical support for said redesignation." (EPA App. B55-56.) As previously noted, on October 5, 1978, after a 60-day comment period and after consideration of challenges to the validity of the monitored data, the EPA Administrator reaffirmed his March 3, 1978, promulgation of Marion County as nonattainment because "The overwhelming weight of evidence supports primary SO_2 nonattainment in Marion County . . . ." For want of testing he reclassified Marion County as attainment with respect to the secondary standard for sulfur dioxide. (EPA App. B4.) As a result, Indiana must determine what revisions must be made in its 1972 Air Pollution Control Implementation Plan (SIP) so that the air quality in Marion County will improve sufficiently to meet the national primary sulfur dioxide standards by the December 31, 1982, statutory deadline for national primary standard compliance (42 U. S. C. § 7502(a)(1).) At the time of the oral argument we were not advised whether Indiana has as yet submitted a revised plan setting forth new requirements to be imposed on pollution sources or whether EPA has approved such a plan.[3]

Petitioners' main argument is that the Administrator's designation of Marion County as a nonattainment area was based upon Indiana recommendations that assertedly fall short of certain procedural requirements imposed by state law. However, in petitioners' comments to EPA attacking the designation of Marion County as a nonattainment area, they did not challenge the authority of the Board to submit the recommended designations or the procedures followed by the Board. Therefore, their attack on the designation by the Board comes too late. *Portland Cement Association* v. *Ruckelshaus,* 486 F. 2d 375, 394; *Weyerhauser Company* v. *Costle,* 590 F. 2d 1011, 1028 n. 15 (D. C. Cir. 1978); 42 U. S. C. § 7607(d)(7)(B).

3. The deadline for such revising of the SIP was July 1, 1979. Section 172(a)(1) of the Act (42 U. S. C. § 7562(a)(1)).

Subsequent to the oral argument we were advised that the Circuit Court of Hancock County, Indiana, has decided that in making its recommendations to EPA the Indiana Air Pollution Control Board did not properly comply with Indiana law (*Indianapolis Chamber of Commerce, Inc. and Indianapolis Power & Light Company* v. *Air Pollution Control Board of the State of Indiana,* Cause No. 38084, decided May 11, 1979) and that its designation of Marion County as a nonattainment area is therefore void. That court's findings of fact and conclusions of law supporting its injunction against the Board's Marion County sulfur dioxide nonattainment area designation were those submitted by Indianapolis Power & Light Company. Being a decision of a *nisi prius* court, it is not binding on us (*Commissioner* v. *Estate of Bosch,* 387 U. S. 456, 465) unless the decision is affirmed on appeal.[4]

If, as a result of the final outcome of the Indiana litigation, the Indiana Air Pollution Control Board develops different supporting technical information, the EPA Administrator will evaluate the new submission and possibly change the Marion County designation under Section 107(d)(5) (42 U. S. C. 7407(d)(5)). However, Section 107(d) does not give him the authority to disapprove the prior Indiana designation of Marion County as a sulfur dioxide nonattainment area merely because the Indiana Air Pollution Control Board may not have complied strictly with state procedural requirements.

4. The Indiana Attorney General is presently considering an appeal. We certainly doubt that the documents sent by the Air Pollution Control Board to the EPA and upon which the EPA designated Marion County as nonattainment for sulfur dioxide can be deemed "rules" within Indiana Code 4-22-2-3 so that under IC 4-22-2-5 they must be submitted to the Indiana Attorney General and approved by the Governor and filed with the Secretary of State before they can be effective as urged by petitioners. See *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 414.

The EPA Administrator's Designation of Marion County as a Nonattainment Area is Neither Arbitrary nor Capricious.

In addition to arguments that have been rejected by this Court in *United States Steel Corporation* v. *United States Environmental Protection Agency* and *Oscar Mayer & Company, Inc.* v. *Costle, supra,* petitioners contend that the EPA's designation of Marion County as a nonattainment sulfur dioxide area is arbitrary and capricious. This is one of the grounds for which a court may reverse an action of the Administrator. Section 307(d)(9)(D)(i) of the Clean Air Act (42 U. S. C. § 7607 (d)(9)(D)(i). Petitioners' argument may not be sustained. The controversy centers on the validity of the monitoring results underlying the nonattainment designation. As the Government notes (Br. 16), petitioners have commented extensively before the Indiana Air Pollution Control Board and the EPA concerning the former's January 17, 1978, recommended sulfur dioxide nonattainment designation for Marion County and the Board's technical Support Document.[5] Although the state agency later sought to withdraw the nonattainment designation, it acknowledged that it had no technical support for doing so (EPA App. B54-56). Moreover, both the state agency and the EPA determined that the monitoring data relied upon by the State is valid for the purpose of designating Marion County as a sulfur dioxide nonattainment area.[6] Petitioners have disregarded the monitoring information supporting that designation.

In its first Draft Support Document the Indiana Air Pollution Control Division explained that in designating sulfur dioxide nonattainment areas such as Marion County within Indiana its staff

> "has followed a set of criteria designed to accommodate (a) the exact EPA, Region V, guidelines, (b) physical realities that produced "freak and unavoidable" violations of the air quality standards, and (c) isolated, non-complying emission sources causing the violations (which could be eliminated in the future by corrective enforcement action permitted by existing SIP)" (Pet. App. A30).

5. See EPA App. B16-B20, B74-B78 and Record Document Nos. 34 (44) and (51) for comments before the Indiana agency. See EPA App. B44-B46-B49-B51 and Record Document Nos. 26 and 27 for comments before the EPA.

6. As explained in its March 3, 1978, decision, in making nonattainment determinations the EPA "considered all available monitoring data where it was determined to be valid" (Pet. App. A3).

As a result, this draft showed all Marion County to be nonattainment as to sulfur dioxide (Pet. App. A32).

As shown in the state agency's Support Document, the Board relied upon monitoring data and modeling studies in recommending that Marion County be designated as a nonattainment area (Pet. App. A80). These are the methods specified by Section 171(2) of the Clean Air Act (42 U. S. C. 7501(2)) for determining areas to be designated nonattainment under Section 107(d) (42 U. S. C. § 7407(d)). Thus in that Support Document the following explanation is given for determining whether Marion County should be a nonattainment area for sulfur dioxide:

> "Violations of the primary short-term SO_2 standards were indicated by the 1976 November 27, 28, and 29 data from Marion County SAROAD site 5240-033-HO1 at 7436 Mann Road, which is a suburban site. Annual average SO_2 estimates using 1975 average emissions and 1975 actually sampled SO_2 results indicate concentrations as high as $119^2 ug/m^3$ in the southwest industrial region of the city. Projected 24-hour and 3-hour levels by this CDM study, using U.S. Environmental Protection Agency approved statistical transformations (Larsen's transformations), are well in excess of NAAQS ceilings. Preliminary short-term estimates also agree with these projections and tend to suggest potentially high SO_2 levels within the county's industrial area. These estimates were made using 1975 emission figures supplied to the Indiana Air Pollution Control Division by the various emission sources within the county in August 1977. Final results of the Indiana Air Pollution Control Division studies showing potential SO_2 levels in Indianapolis will be available after the accuracy of these emission figures is established by mutual consultations between the sources, the city agency, and the State Air Pollution Control Division." (Pet. App. A80.)

Although the City of Indianapolis' Air Pollution Control Division subsequently criticized the aforesaid November 1976 monitoring data because of an alleged monitor malfunction, the Indiana Air Pollution Control Board did not reverse its nonattainment designation and did not change its final technical report. The Indiana Air Pollution Control Board refused to alter the nonattainment designation based on the City of Indianapolis Air Pollution Control Division's claim of November 1976 monitor malfunction because the city agency "could not produce strip chart recordings and logs for the high SO_2 days in question" (Pet. App. A142). Therefore the EPA found there was insufficient evidence to discount the monitoring violations shown in the final technical report. (Pet. App. A143; EPA App. B52-B53.)

In opposing the Indiana Air Pollution Control Board's use of its modeling to support the Marion County nonattainment designation, petitioners offered their own monitoring studies in an effort to show that the area of Marion County was cleaner than required. However, EPA rejected petitioners' studies because of at least four serious technical deficiencies. (EPA App. B27-B28.)

In adhering to the Marion County nonattainment classification for sulfur dioxide in October 1978, the EPA Administrator stated:

> "Four commenters recommended redesignation of Marion County from nonattainment for primary and secondary SO_2 standards to unclassifiable. Commenters challenged the validity of the monitored data which demonstrated violations of the 24-hour primary SO_2 standard and the accuracy and validity of dispersion models which predicted violations of the annual and short-term primary SO_2 standards. Upon evaluation, EPA finds that the monitored data is valid and the dispersion modeling done for Marion County used an accepted model (CDM), which predicted annual violations of the SO_2 standard. These results have been supplemented by urban RAM runs which predicted short-term violations of the SO_2 standard. The overwhelming weight of evidence supports primary SO_2 nonattainment in Marion County and that designation will remain unchanged. Since secondary violations have been neither monitored nor predicted by dispersion modeling, Marion County is being reclassified as attainment for the secondary SO_2 standard." (EPA App. B4.)

Such data reinforces the Administrator's March 1978 primary sulfur dioxide nonattainment designation for Marion County and "is pertinent to show the validity of the EPA actions." *American Petroleum Institute* v. *EPA*, 540 F. 2d 1023, 1034 (10th Cir. 1964); see also *Amoco Oil Co.* v. *EPA*, 501 F. 2d 722, 729 and n. 10 (D. C. Cir. 1974). These authorities were followed in our *Oscar Mayer & Company* decision, *supra* at 7 n. 10.

Since Marion County has been designated as a nonattainment sulfur dioxide area, under Section 172(b)(3) of the Act (42 U. S. C. § 7502(b)(3)) the Air Pollution Control Division has prepared a new draft report for the Indiana Air Pollution Control Board and the State, using the latest methods for determining sulfur dioxide concentrations in Marion County. This showed that "sources in Marion County would cause violations of 24-hour primary NAAQS [national ambient air quality standards] for SO_2 at several locations in the [deadline] year 1982." Consequently a revised SIP will be prepared for Indiana in order to protect the health and welfare of Marion County residents. (EPA Br. Exhibits 3-4.) Petitioners will be able to comment on the revised SIP by participating in the state hearings thereon and by commenting on the proposed federal action once the SIP is submitted to EPA. This further undercuts petitioners' claim that EPA has acted in an arbitrary and capricious fashion in thus far adhering to the Indiana Air Pollution Control Board's recommended designation of Marion County as a sulfur dioxide area. At present the EPA Administrator has no justification for rejecting Indiana's technically supported recommendation that Marion County be designated a nonattainment area for sulfur dioxide purposes.

The March 3, 1978, decision of the EPA Administrator is affirmed.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 78-1563 and 78-1564

UNITED STATES STEEL CORPORATION, and YOUNGSTOWN SHEET AND TUBE COMPANY,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petitions for Review of an Order from the
United States Environmental Protection Agency

ARGUED APRIL 18, 1979—Decided AUGUST 1, 1979

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This case arises from the Environmental Protection Agency's promulgation of a list designating those areas which do not meet national primary or secondary ambient air quality standards. The petitioners attack these designations on both substantive and procedural grounds. We find both claims to be without merit, and we uphold the agency's designations.

I

Under the Clean Air Act, 42 U. S. C. § 7401-7626, the Administrator of the EPA was required to promulgate national primary and secondary ambient air quality standards. 42

U. S. C. § 7409(a). The Administrator has promulgated these standards and they are codified at 40 C. F. R. § 50.1-50.11 (1978). After these standards were established, the states had a statutory responsibility to develop implementation plans to achieve these standards, *See* 42 U. S. C. § 7410. The Act required the state plans to provide for the attainment of these standards no later than 1975. However, in 1977 it became clear that these standards had not yet been achieved. Accordingly, Congress amended the Act to restructure the scheme for attaining these standards. Clean Air Act Amendments of 1977, P. L. 95-95, 91 Stat. 685 (August 7, 1977). These amendments pushed the primary standard compliance deadline forward to 1982. 42 U. S. C. § 7502(a)(1). Further, to insure that this deadline would be met, Congress established a new implementation process. This implementation process was to begin with a combined state and federal effort for the designation of those areas not in compliance with air quality standards. 42 U. S. C. § 7407(d)(1).[1] The designation of an area as "nonattainment"

1. The text of the provision is set out below:

List of noncomplying regions

(d)(1) For the purpose of transportation control planning, part D of this subchapter (relating to nonattainment), part C of this subchapter (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and twenty days after August 7, 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977—

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;

(C) do not meet a national secondary ambient air quality standard;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(Footnote continued on next page.)

imposes upon the state the obligation to include certain more stringent provisions in its implementation plan. 42 U. S. C. § 7502.

Under the scheme established by § 7407(d)(1), the states were required to submit to the EPA, within one hundred and twenty days after the passage of the Act, a list identifying the attainment status of all air quality control regions within the state. Pursuant to this requirement, Harry D. Williams, director of the Air Pollution Control Division of the Indiana State Board of Health submitted a draft copy of the state of Indiana's designations, indicating that a final copy would be sent on December 5, 1977, the statutory deadline. The final report designated portions of Northern Indiana in which petitioners operate steel works as nonattainment areas.

The EPA published its list of attainment designations, based on the state's submissions, on March 3, 1978. 43 Fed. Reg. 8962.[2] This list accepted the state of Indiana's designation of

(Footnote continued from preceding page.)

(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate.

(4) Any region or portion thereof which is not classified under subparagraph (B) or (C) of paragraph (1) of this subsection for sulfur dioxide or particulate matter within one hundred and eighty days after August 7, 1977, shall be deemed to be a region classified under subparagraph (D) of paragraph (1) of this subsection.

(5) A State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection.

2. The statutory deadline for promulgating these designations was February 3, 1978. As mentioned later in the text, *infra* p. 9, th

(Footnote continued on next page.)

certain portions of Northern Indiana as "nonattainment." Furthermore, the EPA indicated that although these designations were to be immediately effective, it was soliciting comments on these designations for 60 days. Comments were submitted by the petitioners in this case and by other interested parties, and on October 5, 1978, the EPA reaffirmed its designation of certain portions of Northern Indiana as nonattainment, although it did make alterations in designations with respect to other areas. 43 Fed. Reg. 46007.

II

Petitioners contend that the EPA's promulgation of these attainment designations violated the procedural requirements of 5 U. S. C. § 553 by not providing for notice and comment prior to the effective dates of the designations.[3] We reject this conten-

(Footnote continued from preceding page.)

failure to meet the deadline may have been due in part to late submissions by states.

3. The threshold issue posed by this contention—*viz.*, that the designations constituted rulemaking—is not without difficulty, despite the Fifth Circuit's unanalyzed assertion that "the designations clearly come within the broad statutory definition." *United States Steel Corp.* v. *EPA*, No. 78-1922, at 7-8 (5th Cir., May 3, 1979). The Administrative Procedure Act defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U. S. C. § 551(4). Although the words "or particular applicability" perplexingly appear to expand this definition beyond useful perimeters, the legislative history demonstrates that these words were added late in the consideration of the act to prevent legislative-type promulgations from falling outside the definition of "rule" when they were directed to "named persons." S. Rep. No. 248, 79th Cong. 2d Sess. 283 n. 1 (1946); K. Davis, Administrative Law Treatise § 5.02, at 295-96 (1958). Thus, where a general statement of policy is directed to a group of multiple, but specified, parties, the statement is a rule. However, a designation, such as the one in this case, that applies solely to a specific, delimited situation is an entirely different matter. Indeed, the EPA's designation of areas as nonattainment is directly analogous to the Secretary of Transportation's designation of areas in public parks as necessary routes for the construction of highways, a function which the Supreme Court termed as "plainly not an exercise of a rulemaking function." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 414 (1971). Under this theory, the

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tion on two grounds. First, we hold that the agency had "good cause" to postpone the proceeding within the meaning of section 553's specific exemption. Second, we find that even if the agency lacked "good cause" within the terms of section 553, we are precluded from reversing by the Clean Air Act. The Act limits the circumstances in which rules promulgated by the EPA may be reversed for procedural errors.

A

Section 553(d) of the Administrative Procedure Act contains two "good cause" exceptions. The first, section 553(b)(B) provides that notice of, and public comment on, agency rules may be dispensed with "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest." The second, section 553(d)(3), provides that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date except . . . (3) as otherwise provided by the agency for good cause found and published with the rule." Accordingly, in a case such as the one before us where a regulation is made effective before notice and comment, the agency could rely on either "good cause" provision. Thus, the EPA made its attainment designations immediately effective, stating:

> The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110 (a)(2)(I) and 172 of the Act. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments.

(Footnote continued from preceding page.)
agency's designation of attainment areas would not be subject to the requirements of section 553. Since the agency, however, has termed these designations as rules, we need not reach this issue.

> Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

The agency's statement of "good cause" does not reveal on which of the two provisions the agency was relying. Although at least two commentators have suggested that the two provisions provide the same standard of good cause,[4] we believe that the standards are distinct and that the agency action, while justifiable under the (b)(B) standard, is unquestionably justifiable under the broader standard set out by (d)(3).

Turning first to whether the agency action here was justified under the narrower (b)(B) standard, we find that such justification existed under the impracticability standard embodied in the statutory language of the first good cause exception. The legislative history of this impracticability standard reveals that Congress intended this exemption to operate when the regular course of rulemaking procedure would interfere with the agency's ability to perform its functions within time constraints imposed by Congress. Early versions of this provision allowed public participation to be dropped where it was "impracticable because of unavoidable lack of time or other emergency." S. Doc. No. 248, 79th Cong., 2d Sess. 140, 148, 157 (1946). The exception was broadened by the elimination of this qualifying language. The Senate and House Reports interpreted "impracticable" in this broader formulation as a situation "in which the due and required execution of the agency functions would be prevented by its undertaking public rule-making proceedings." *Id.* at 200, 258.

Two other courts have agreed that the "good cause" exception may be utilized to comply with the rigors of a tight statutory

4. *See* K. Davis, Administrative Law of the Seventies § 6.01-11 at 207 (1976); Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts,* 118 U. Pa. L. Rev. 540, 599-600 (1970).

schedule. In *Clay Broadcasting Corp.* v. *United States,* 464 F. 2d 1313 (5th Cir. 1972), *rev'd on other grounds sub nom. National Cable Television Assn., Inc.* v. *United States,* 415 U. S. 336 (1974), the court held that the FCC had good cause to dispense with rulemaking before altering a license fee schedule since

> (1) wide-spread notice in fact would be provided affected parties; (2) a first of the month effective date was required for administrative pro-ration of yearly fees; and (3) that in accordance with Congressional directives the Commission wanted the fee schedule to cover as much of fiscal 1971 as reasonably possible.

Id. at 1320. Likewise, in *Energy Reserves Group* v. *FEA,* 447 F. Supp. 1135 (D. Kan. 1978), the Court found that promulgation without rulemaking proceedings of regulations defining a congressional exemption to its oil price control scheme was justified under the "good cause" exemption. Congress required these regulations to be promulgated in 15 days, leading the court to find "good cause" to rely on "the legislative requirement of expeditious promulgation." *Id.* at 1150.

The legislative scheme involved in this case also confronted the EPA with a series of tight statutory deadlines. The EPA was given 60 days after the date on which states were required to provide lists of nonattainment areas to promulgate final designations of nonattainment areas. 42 U. S. C. § 7407(d)(2). More importantly, the states were required to have promulgated implementation plans for designated nonattainment areas by January 1, 1979. 42 U. S. C. § 7502 (annotation) [Pub. L. 85-85, § 129(c)]. These plans are to provide for attainment in these areas "as expeditiously as practicable . . . [but] not later than December 31, 1982." 42 U. S. C. § 7502(a)(1). Furthermore, the development of these plans is a time-consuming process, requiring formal involvement by the public, local governments and state legislative bodies as well as the redevelopment of current emissions inventories. *Id.* at § 7502(b). These

deadlines were a response to the failure of the states to meet prior attainment deadlines and represent Congressional concern over the seriously adverse health consequences of continued nonattainment.[5] H. Rep. No. 294, 95th Cong., 1st Sess. 207-211

5. Ironically, much of the Congressional concern over delays in meeting ambient air quality standards was directed at the failure of the petitioners in this case to reach compliance. The only specific example of nonattainment given by the House Report was contained in the following passage:

> The committee is also mindful of the fact that several categories of major polluters have not complied with emissions limits in nonattainment areas. The 1975 subcommittee hearings reflect this disturbingly high incidence of non-compliance. In particular, the following testimony is of great concern:
>
> Mr. Rogers: Let's see, we have had the law 5 years now. Could you tell me company by company, how many of your plants are in compliance presently and how many are not?
>
> Mr. Armour [Interlake, Inc.]: I think we have to define in compliance with what.
>
> Mr. Rogers: The Clean Air Act?
>
> Mr. Armour: We do not have any in compliance.
>
> Mr. Anderson [Bethlehem Steel Corp.]: None.
>
> Mr. Jaicks [Inland Steel Co.]: None.
>
> Mr. Mallick [U. S. Steel Co.]: None.
>
> Mr. Tucker [National Steel Corp.]: We have no plants in compliance.
>
> Mr. Jaicks: It sounds terrible. But these are hard value money expenditures.

H. Rep. No. 294, 95th Cong., 1st Sess. 210-11 (1977). Given that the strict deadlines were intended to force compliance by U. S. Steel and others, we are hesitant to allow U. S. Steel to again delay compliance through its procedural challenges. We note that if we were to remand in this case, the entire deadline scheme would be thrown into complete disarray. State Implementation Plans, which were scheduled to be (and presumably were) formulated by January 1, would have to be further delayed while the EPA proceeded with yet another notice and comment period, and after promulgation of those designations states would have to repeat the hearing-consultation process in order to resubmit implementation plans. In the Fifth Circuit's remand of the rulemaking now before us, the court delayed the state deadline until nine months after the second "final" promulgation. This, of course, would (given four months to receive and evaluate comments) throw off the statutory scheme by almost two years. *See United States Steel Corp.* v. *EPA,* No. 78-1922 (5th Cir., May 3, 1979). Thus, remand in this case would permit U. S. Steel to continue the very procrastination which Congress sought to end.

(1977). Thus, the EPA was properly concerned that these explicit deadlines be met. This concern was magnified by the fact that some states, such as Wisconsin, were almost 2 months late in submitting their proposed designations. See *Oscar Mayer Co.* v. *Costle,* No. 78-1548 (7th Cir. 1978) (decided with this case). Since some of these designations had to be rejected by the EPA,[6] more time was required between the state submission and EPA publication. Adding one month for comment and four months to review and respond to these comments,[7] compliance with notice and comment procedures would have delayed promulgation by five months or more, leaving the states with less than 6 months to formulate implementation plans. Thus, given the "legislative requirement of expeditious promulgation,"[8] the need for the states to begin promptly their own planning process,[9] and the continuing adverse impact on health that any

6. For example, the state of Wisconsin's designation of Madison had to be altered. See *Oscar Mayer Co.* v. *Costle,* No. 78-1548 (7th Cir. 1978) (decided with this case).

7. This is the time that it actually took the EPA to review these comments. The Third Circuit in its computation of the time that pre-promulgation notice and comment would have required in this case allowed the EPA only ninety days to evaluate. *Sharon Steel Corp.* v. *EPA,* No. 78-1522 (3d Cir., April 25, 1979). We see no reason to adopt this apparent presumption that the EPA was dilatory or inefficient in reviewing the comments. As discussed further in note 14 *infra,* we believe that the Third Circuit ignored applicable law in its remand of the designations at issue in this case, and we have declined to adopt its reasoning or its result. *See* also note 11 *infra.*

8. Other cases finding that the agency had sufficient opportunity to meet deadlines and still supply prior comment opportunity are distinguishable in that they involved much longer time periods than the instant case. In *American Iron & Steel Institute* v. *EPA,* 568 F. 2d 284 (3d Cir. 1977), the EPA knew of its duty to promulgate regulations three years before the deadline. Likewise in *Consumer Union of U. S., Inc.* v. *Sawhill,* 393 F. Supp. 639 (D. D. C.), *aff'd,* 523 F. 2d 1404 (Emer. Ct. App. 1975) there was more than one year between passage of the act and the final deadline.

9. The need to supply information promptly to facilitate planning has been recognized by Congress as creating "good cause." A House Oversight Committee approved the Department of Agriculture's use

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further delays would entail,[10] we hold that the administrator

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of the exception to make last-minute changes in acreage allotments and marketing quota regulations without prior comment in order to facilitate farmers' planting decisions. Staff of House Comm. on Gov't Operations, 85th Cong., 1st Sess., survey and study of Administrative Organizations, Procedure and Practice in the Federal Agencies 26-27 (Comm. Print 1957), *as cited in Bonfield, supra* note 3, at 595.

10. The magnitude of this impact was set out in the most compelling terms by the House Report on the amendments:

> In one of these studies, the National Environmental Research Center (1974) evaluated the potential public health effects of increased emissions of sulfur oxides from steam electric powerplants, attributable largely to increased use of coal in the absence of sulfur oxide stack gas cleaning. Excess mortality and illness rates were calculated by obtaining a damage function for each of five health effects associated with sulfur oxide exposure. Damage functions were based upon published results from studies in 2 to 6 geographic areas per adverse health effect. Population size and exposure for each electric power region east of the Mississippi River were considered, and estimates of illness attributable to sulfur oxides were derived. A portion of the results is shown in the following table:

ESTIMATES OF ADVERSE HEALTH EFFECTS ATTRIBUTABLE TO SULFUR OXIDE EXPOSURES IN THE EASTERN UNITED STATES

Adverse health effects	Estimate of illness attributable to acid sulfates			
	Standards met		Standards not met	
	1975	1980	1975	1980
Million days of aggravated heart and lung disease.....	5.3	1.2	24.4	33.8
Increased number (millions) of asthma attacks.....	2.5	.8	8.8	11.5
Thousands of lower respiratory diseases in children.....	48.0	0	486.0	888.0

> As shown, nonattainment of air quality standards in a wide and densely populated region could result in a phenomenal health impact, measured in terms of millions of days of aggravated disease, asthma attacks and lower respiratory disease episodes. Obviously, these are only projections, not predictions, of the impact of increased sulfur oxide emissions in an area that is already heavily impacted with emission sources. (1977 House hearings, American Lung Association, pp. 3-4).

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had "good cause" to exempt these designations from § 553.[11]

Even if the EPA's actions here were not justified by the impracticability standard of the § 553(b)(B) exemption, we nonetheless hold that it had "good cause" within the meaning of 553(d)(3). We disagree that the phrase "good cause" should be interpreted similarly in both provisions. First, Congress intentionally added modifying language giving specific instances of good cause to 553(b)(B), *i.e.*, where notice and comment are "impracticable, unnecessary, or contrary to the public interest." That language is missing in (d)(3). Furthermore, since (d)(3) only dispenses with *prior* notice and comment, and not notice and comment altogether there is sound reason to believe that "good cause" should encompass more situations in (d)(3) than in (b)(B). Finally, the legislative history of (d)(3) shows that Congress considered a broader category of "good cause" for

(Footnote continued from preceding page.)

H. Rep. No. 294, 95th Cong., 1st Sess. 209 (1977). The Fifth Circuit in *United States Steel* v. *EPA*, No. 78-1922 (5th Cir., May 3, 1979), discussed and rejected at notes 11 & 14 *infra*, declined to apply the "good cause" exception in its review of the EPA rule under review here, holding that it was a "safety valve to be used where delay would do real harm" and citing as an example regulations designed to alleviate gas shortages and consequent violence at gas stations. See *Reeves* v. *Simon*, 507 F. 2d 455, 458-59 (Emer. Ct. App. 1974), *cert. denied*, 420 U. S. 991 (1975). We are at a loss to understand how gas shortages and fistfights constitute "real harm" whereas mortality and illness resulting from continued high levels of air pollution do not.

11. Of course, a remand at this point would intolerably delay the implementation of the statutory scheme and completely frustrate the Congressional purpose. For example, the Fifth Circuit in *United States Steel* v. *EPA*, No. 78-1922 (5th Cir. May 3, 1979), admitted that this remand would delay state implementation plans by more than seven months. Slip op. at 14. This admission was somewhat conservative since the new time scheme dictated by the court to replace the Congressional scheme would have involved at least 13 months from the date of decision *not* counting the notice and comment period which we have suggested would add four to five more months. *See* text accompanying note 7 *supra*. Thus, the Fifth Circuit's remand will set back the schedule by almost two years behind the January 1, 1978 implementation date. Further, the Third Circuit's approach to this problem strikes us as unsound. Recogniz-

(Footnote continued on next page.)

this exemption than those specified in the three instances set out in (b)(B). The House Report on the APA stated:

> Many rules . . . may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulations.

S. Doc. No. 248, 79th Cong., 2d Sess. 260 (1946). In particular, the reference to "demonstrable urgency" appears to permit findings of "good cause" in more situations than (b)(B) would permit, and certainly such urgency exists in this case where any delay in the EPA's designation would run the risk of delaying the formulation of state implementation plans and the consequent health detriment of delayed nonattainment.

B

Even if the agency's procedures here were not in technical compliance with § 553 of the APA, we would still not be able to reverse the Administrator's action in this case. We have already noted the Congressional concern manifest in the Clean Air Act that national attainment be achieved as expeditiously as practicable. This concern was reflected in the desire that the due administration of the statutory scheme not be impeded by endless litigation over technical and procedural irregularities. As the House Report to the Amendments stated:

(Footnote continued from preceding page.)

ing that the remand of the proceedings might "endanger the Congressional scheme for the control of air pollution," the Third Circuit attempted to resolve this difficulty by leaving the designations in effect except as to the two petitioners in the case before the court. *Sharon Steel Corp.* v. *EPA*, No. 78-1522, slip op. at 9 (3d Cir. April 25, 1979). If the rule is defective, however, we see no reason why anyone, whether they filed suit or not, should be subject to it. We, of course, have found the designation procedure valid and decline to follow the Third and Fifth Circuits. *See also* note 14 *infra*.

This opinion has been circulated among all judges of this Court in regular service. A majority did not favor a rehearing in banc on the question of this difference among circuits.

> Under the flexible procedures specified by the committee, disputed questions of classification may arise concerning, for example, whether a given question involves "facts" or "policy" or whether a given fact is "legislative" or "adjudicative." To prevent rulemaking from bogging down in arguments about such matters, and to underline that the agency is authorized to adopt rule-making procedures to the individual case, the committee has limited the extent to which the Administrator's decisions on such procedural matters may be reversed during judicial review.

H. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977).

Accordingly, the following limitations on review were enacted. Section 7607(d)(9) provides:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—
>
> . . . .
>
> (D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) [that "only an objection to a . . . procedure which was raised . . . during the period for public comment . . ." may be raised during judicial review] has been met, and (iii) the condition of the last sentence of paragraph 8 [that the procedural errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors has not been made"] is met.

Even if this rulemaking procedure is not one of those specified in subsection(d),[12] the legislative report's reference to the legislative-adjudicative distinction (a procedural issue which is not addressed in subsection (d) and which relates to the propriety of any rulemaking at all) suggests that Congress meant this limitation on review of procedural errors to extend to all rulemaking by the EPA whether or not it is in the explicit categories covered by all the provisions of section 7607(d). Thus, section 7607(e) provides:

> Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter [*i.e.*, the Clean Air Act of 1970], except as provided in this section.

Applying section 7607(d)(9) to the alleged procedural errors in this case, we find that none of the prerequisites for reversal have been satisfied. First, given the statutory time constraints and the delays that would be occasioned by prior notice and comment, we cannot say that it was arbitrary and capricious for the Administrator to postpone notice and comment until after the effective date. Second, we find no evidence in the record that the petitioners ever raised these procedural matters in the notice and comment period. The only issues raised by them during that period related to the substantive validity of the designations. Finally, we cannot say that the rule under review would have been any different if notice and comment had occurred before the effective date. It is important to realize that the rule under review here is the rule as finally promulgated in October 1978 and reflects many final changes made in the rule as a result of the EPA's consideration of submitted comments. *Compare* 43 Fed.

12. Arguably these designations fit within the subsection's application to "the promulgation or revision of an implementation plan by the Administrator under section 7410(c) . . ." or to the "promulgation or revision of regulations under subtitle C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility)." 42 U. S. C. § 7607(d)(1)(B), (I). The designation of areas as "attainment" or "nonattainment" is an integral part of the promulgation of implementation plans and of regulations designed to prevent significant deterioration of air quality.

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See especially 42 U. S. C. § 7407(d)(1), stating that the designations are "[f]or the purpose of . . . part C of this subchapter (relating to prevention of significant deterioration of air quality)." Subchapter C, for example, (42 U. S. C. § 7470-91) sets out the provisions applicable to areas designated "attainment." 42 U. S. C. § 7471. Likewise, state implementation plans must have special provisions for nonattainment areas. 42 U. S. C. §§ 7501-08. Thus, no regulations with respect to implementation plans under subchapter C or subchapter D (§§ 7501-08) can be promulgated without these designations.

Reg. 8963 (1978) *with* 43 Fed. Reg. 45988 (1978).[13] Given that the agency was clearly willing to consider, fully and objectively, all comments in the post-promulgation period, there is no reason to believe that its consideration of the comments would have been any different if completed before the effective date. Thus, we cannot make the required finding that the rule would have been different if the notice and comment period had occurred earlier.[14]

III

The petitioners also challenge the designation of the northern portion of Lake County, Indiana as "nonattainment," arguing that the failure of the designation to delimit an even smaller portion of Lake County as the only nonattainment area was arbitrary and capricious. The designation was based on the following data. First, violations of sulfur dioxide primary standards were monitored at the Hammond continuous monitor during April 1976 as well as April and May 1977. Second, "the results of short-term modeling studies carried out for various sources in the area using the 1974 emissions . . . [indicated] the potential of reaching some very high level values . . ." in the northern portion of Lake County. *See* Indiana Air Pollution

13. Numerous pending challenges to the attainment designations were dropped as a result of the EPA's revision of the designations. *See Bethlehem Steel Co.* v. *EPA*, No. 78-1556 (7th Cir., Nov. 28, 1978); *Central Phosphate, Inc.* v. *Costle*, No. 78-1929 (5th Cir., October 16, 1978); *CF Chemicals, Inc.* v. *Costle*, No. 78-1931 (5th Cir., Oct. 16, 1978); *Occidental Oil Shale, Inc.* v. *EPA*, No. 78-1325 (10th Cir., October 6, 1978); *National Zinc Co.* v. *EPA*, No. 78-1327 (10th Cir., Oct. 6, 1978); *Gulf Oil Corp.* v. *EPA*, No. 78-1323 (10th Cir., Oct. 6, 1978); *Board of County Comm'rs* v. *EPA*, No. 78-1326 (10th Cir., Oct. 6, 1978).

14. The two cases reaching contrary results and remanding these designations to the EPA for notice and comment prior to effective issuance neither mention nor apply the special review provisions of section 7607(d)(9)(D). *Sharon Steel Corp.* v. *EPA*, No. 78-1522 (3d Cir., April 25, 1979); *United States Steel Corp.* v. *EPA*, No. 78-1922 (5th Cir., May 3, 1979). Since we believe this provision to be applicable and controlling, we reach a different result than these cases. See footnote 11 *supra*.

Control Division, Proposed Nonattainment Areas in Indiana: A Support Document, IV-183 (1977) [Pet. Appendix at 56]. Since monitors only indicate air quality at the monitoring site alone, modeling studies are necessary to extrapolate from the monitor data to determine air quality throughout a larger region. The use of such studies to assess air quality throughout wide regions has been approved in *Cleveland Electric Illuminating Co.* v. *EPA*, 572 F. 2d 1150, 1160-64 (6th Cir.), *cert. denied*, ... U S. ..... (1978).

The petitioners forward three arguments as to why this factual basis is insufficient to support the designation under review. First, they point out that the modeling studies were based on 1974 data and did not take into account any emission reductions that may have occurred since then. Second, the petitioners rely on their own modeling studies. Petitioner Youngstown cites its own study, prepared by Arthur D. Little, Inc., as allegedly supporting the conclusion that the major contributors to this high monitor reading were two oil refineries near the Hammond monitor and that other sources in the area are not major contributors. Petitioner United States Steel likewise claims that its own study, prepared for it by Equitable Environmental Health, concludes that the days on which violations were recorded at the Hammond monitor were days on which the prevailing wind direction would preclude any impact by the petitioner's source and that on the days that the wind would have permitted such an impact, no violations were recorded. Finally, the petitioners cite the conclusion of a subsidiary EPA official that data for the Lake County area was insufficient and that, pending more extensive studies, only the area directly around the Hammond monitor should be designated nonattainment.

We do not find these arguments to be a persuasive basis for overturning the designations. First, the petitioners' argument that the modeling was based on outdated data is not compelling. Any strength that it might have could only be based on petitioners' assertion that improvements in emissions have been

effected since 1974. There is, however, no support for this assertion in the record. Petitioners' comments on the proposed designations do not even make this assertion, much less provide any factual support for it. Indeed, the comments do not squarely raise the objection that the data is too old, and thus the petitioners are arguably precluded from raising this objection before this court. Finally, since the designation of an area as nonattainment triggers the requirement that the state engage in comprehensive current monitoring in order to define more precisely the attainment status of various regions, *see* 42 U. S. C. § 7502(b)(3), the use of three-year-old data to make this initial designation can hardly be said to be arbitrary or capricious.

Nor do we find that the petitioners' studies compel a different conclusion. The gist of these studies is that other sources were the principal contributors to the measured excesses. This argument assumes that the designation process is designed to define those areas in which the principal offending sources are contained. The statute does not expressly state the standards or methods by which areas are to be designated. Although one method would be to designate the areas containing the principal offenders as nonattainment, another approach would be to look simply at the expected air quality throughout a region and designate noncomplying areas, regardless of the origin of the noncompliance, as "nonattainment." The EPA has clearly adopted the latter approach. In its response to comments made before issuance of the final designations, the EPA stated:

> The purpose of the designations is to identify air quality problem areas for which the States and EPA must seek solutions . . . . The area designation . . . thus does not in and by itself dictate the applicable new or existing source requirement. There are essentially three reasons for this.
>
> First, because air pollution emissions are transported from one area to another, the sources that cause or contribute to a violation, or affect a clean locality, may be in different locations from the violation or clean locality itself. Controls will therefore often have to apply to sources outside of the area that the controls are intended to protect.
>
> Second, States may choose to impose requirements over a broader or narrower geographic region than the precise area where sources exist that directly contribute to particular concentrations of a pollutant. For example, for reasons of equity, simplicity of administration, or to allow more growth in clear areas, *states may choose to make their revised emission limitations applicable statewide, rather than restricting the requirement to sources that directly cause or contribute to violations.*
>
> Finally, section 107(d) of the Act provides that attainment status designations were to be made within a very short time period, and were to be composed of air quality control regions (or portions thereof), which are often based on State, county, or other political jurisdictional boundaries. This process is bound to include pockets where the air quality does not correspond to the designation of the area. These anomalies can be taken into account in the more elaborate and thorough proceedings required under the Act for development of plans and issuance of individual permits.

43 Fed. Reg. 40413 (Sept. 11, 1978) (emphasis added).

The EPA specifically used this approach with respect to the designation at issue here. In reply to comments on the Lake County designation, the EPA stated:

> Ten commenters requested revisions to the size of the sulfur dioxide (SO_2) primary nonattainment area in Lake County . . . . [E]ach commenter recommended that the city where the commenter was located be excluded from the nonattainment area . . . [because] most of the heavy industry in the area was not responsible for the violations which were monitored . . . .
>
> The northern portion of Lake County, Indiana, is heavily industrialized with a significant number of large SO_2 emission sources and relatively few continuous SO_2 monitors in operation. Despite the scarcity of the monitors, violations of the standard have been monitored. For this reason, the area must remain nonattainment for SO_2.

Clearly, therefore, the EPA treats the designation process as defining areas with problematic air quality and not merely pinpointing those areas which contain problematic sources. Since "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969), we must accept the EPA's interpretation of the designation process. Accordingly, the petitioners' contentions here that the problems of air quality found within Lake County may be traced to sources other than the petitioners and in a definable area are irrelevant to the designations adopted by the EPA. The monitored exceedances and the modeling studies demonstrated, and petitioners do not really contest, that the air quality in northern Lake County did not meet applicable standards, and that is sufficient to support the designations regardless of the source of the noncompliance.

The petitioners finally rely on the conclusion of an EPA employee to support their conclusion that a smaller area should have been designated nonattainment. Specifically petitioners cite a report by Gerald Regan, Chief of the Air Surveillance Branch for Region V of the EPA, made after reading the research study submitted by United States Steel discussed above and in which he recommended that the nonattainment designation be restricted to the "immediate vicinity" of the Hammond monitor. However, he also stated in this report that "it is probable that the primary SO_2 standard is being exceeded at locations other than the . . . [monitoring] site in Hammond." As we note above, those probable excesses are sufficient to support nonattainment designations, and thus any suggestion by Mr. Regan to limit the nonattainment area must be based on the theory, which we have rejected, that the designation process is designed to pinpoint the principal offending sources. Therefore, nothing in this recommendation provides any reason to overturn the designations under review.

Accordingly, the petitions to set aside the § 7407(d) designations are denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE HANCOCK CIRCUIT COURT

State of Indiana
County of Hancock } ss:

INDIANAPOLIS CHAMBER OF COMMERCE, INC. and INDIANAPOLIS POWER & LIGHT COMPANY,
Plaintiffs,

vs.

AIR POLLUTION CONTROL BOARD OF THE STATE OF INDIANA,
Defendant.

Cause No. 38084

JUDGMENT

The Court, having examined the record, and being duly advised, now enters summary judgment for the plaintiff Indianapolis Power & Light Company and against the defendant in the above cause. It is hereby ORDERED, ADJUDGED and DECREED that:

1. Plaintiff Indianapolis Power & Light Company is entitled to and is hereby granted judgment against defendant Air Pollution Control Board of the State of Indiana.

2. All action of or on behalf of the State of Indiana in implementing Section 107(d) of the Clean Air Act, as amended, 42 U. S. C. A. § 7407(e), by classifying Indiana counties as to whether their ambient air meets or does not meet national ambient air quality standards promulgated under the federal Clean Air Act, as amended, is and may only be, under the laws of the State of Indiana, administrative action subject to the laws of the State of Indiana governing issuance of rules, regulations and standards by agencies of the State of Indiana.

3. The actions taken by or on behalf of the Air Pollution Control Board of the State of Indiana in sending to the U. S. Environmental Protection Agency documents classifying Marion

County and other Indiana counties as to whether the ambient air in such counties meets or does not meet national ambient air quality standards under the federal Clean Air Act, as amended, which actions purported to be taken in implementation of Section 107(d) of the Clean Air Act, as amended by the Clean Air Act Amendments of 1977, 42 U. S. C. A. § 7407(d), were taken in violation of, and without compliance with, the applicable statutes governing the adoption of administrative rules, regulations and standards, and such actions and such documents are accordingly, absolutely void and of no effect as an act of the State of Indiana or for any other purpose, and Marion County has not been duly classified or identified as a non-attainment area for any purpose under the Clean Air Act, as amended, 42 U. S. C. A. §§ 7401 *et seq.*

4. Defendant Air Pollution Control Board of the State of Indiana and its respective members, agents, employees, staff and representatives are permanently enjoined from taking any step or action and from withholding or refusing to take any step or action, or refusing to grant any permit, on the basis or ground that Marion County, Indiana, has been duly classified, designated, or identified as a "nonattainment area" for any purpose under the Clean Air Act, as amended, 42 U. S. C. A. §§ 7401 *et seq.*

Dated this 6 day of May, 1979.

/s/ Ronald L. Gottschalk
Ronald L. Gottschalk
Judge, Hancock Circuit Court

Copies to:

Michael Schaefer, Esquire, Assistant Attorney General, Office of the Attorney General, 219 State House, Indianapolis, Indiana 46204

Jerry P. Belknap, Esquire, Barnes, Hickam, Pantzer & Boyd, 1313 Merchants Bank Building, Indianapolis, Indiana 46204

George J. Lewis, Esquire, Lineback & Lewis, P. C., 2 Masonic Building, Greenfield, Indiana 46140

State of Indiana
County of Hancock } ss:

I, Shirley Riddle, Clerk of Hancock County, do hereby certify this to be a true and correct copy of Judgment as the same appears on record in this office in Order Book 69 Page 44.

Witness my hand and seal at Greenfield, Indiana this 11 day of May 1979.

/s/ Shirley Riddle
Clerk of Hancock County

IN THE HANCOCK CIRCUIT COURT

State of Indiana
County of Hancock } ss:

INDIANAPOLIS CHAMBER OF COMMERCE, INC. and INDIANAPOLIS POWER & LIGHT COMPANY,
Plaintiffs,

vs.

AIR POLLUTION CONTROL BOARD OF THE STATE OF INDIANA,
Defendant.

Cause No. 38084

PLAINTIFF INDIANAPOLIS POWER & LIGHT COMPANY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW [AS ADOPTED BY THE COURT]

This matter comes before the Court on plaintiff Indianapolis Power & Light Company's Motion for Summary Judgment. Based upon the pleadings, affidavits, exhibits and admissions filed in this action, and being duly advised in the premises, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Indianapolis Power & Light Company ("IPL") is an Indiana corporation engaged as a public utility in generating and distributing electric energy to and for the public in Marion County, Indiana, and adjoining areas, and in generating and distributing steam to and for the public in the central core of the City of Indianapolis. IPL's headquarters and principal place of business are located in the City of Indianapolis, Marion County, Indiana. IPL is a member of the Indianapolis Chamber of Commerce, Inc. and is the electric and steam utility company serving the City of Indianapolis, Marion County, and

the Indianapolis Chamber of Commerce referred to in the Verified Complaint, as amended, filed herein by plaintiff Indianapolis Chamber of Commerce, Inc. In such capacity, IPL owns and operates three generating facilities located in Marion County, each of which necessarily in its operation emits or contributes to the formation of sulfur dioxide, particulate matter, carbon monoxide, nitrogen oxides, and ozones.

2. (a) Defendant APC Board is an agency of the State of Indiana and was created by the Indiana Air Pollution Control Law, IC 13-1-1.

(b) The APC Board is authorized by IC 13-1-1-5 to:

> . . . adopt and promulgate rules and regulations which shall create air quality basins based upon scientific study of geographical topographical, meterorological data, and shall adopt and promulgate standards for ambient air quality for each basin. . . .

(c) Rulemaking power of the APC Board is subject to, among others, the requirements of IC 4-22-2-1 to 4-22-2-12 and IC 13-7-7-1 to 13-7-7-4.

(d) The Indiana Environmental Management Board (the "Management Board") is an agency of the State of Indiana created by IC 13-7-2.

(e) The APC Board and the Mangement Board are authorized under IC 13-7-5-1(e) to:

> Act for the state in the adoption of standards pursuant to any federal law regarding environmental protection . . .

(f) The Clean Air Act, 42 U. S. C. A. §§ 7401 *et seq.* (1977 Supp.) as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 712 (Aug. 7, 1977) and the Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, § 14, 91 Stat. 1399 (Nov. 16, 1977) is a federal law regarding environmental protection, and is hereinafter called "Clean Air Act."

(g) Ralph C. Pickard is, and [was] at all times pertinent hereto, the Technical Secretary of the APC Board. Ralph C. Pickard is not and never has been a member of the APC Board or the Management Board, but is a member of the staff of both such boards.

(h) Harry D. Williams is, and was at all times pertinent hereto, employed by the Indiana State Board of Health as the Director of the Air Pollution Control Division of the Indiana State Board of Health. Harry D. Williams is not, and was not at any time pertinent hereto, a member of the APC Board or the Management Board, but is a member of the staff of the APC Board.

3. (a) On or about December 2, 1977, a member of the staff of the APC Board sent or caused to be sent to Region V of the U. S. Environmental Protection Agency ("EPA") a list of each of Indiana's 92 counties, which list purported to set forth, pursuant to Section 107(d) of the Clean Air Act, as amended, 42 U. S. C. A. § 7407(d)(1) classifications as to whether national ambient air quality standards ("NAAQS") promulgated under the Clean Air Act were or were not met in such respective counties on August 7, 1977, or as to whether such counties could not be so classified on the basis of available information.

(b) The list of county classifications referred to in paragraph 3(a) and sent to EPA was set forth in a document entitled

> "Proposed Nonattainment Areas in Indiana
> A Support Document
> Modeling & Data Analysis Section
> Air Pollution Control Division
> November 23, 1977"

(c) A copy of the list of county classifications sent to EPA on or about December 2, 1977, is attached to the Complaint in this action as *Exhibit 1*.

(d) On or about December 8, 1977, in Indianapolis, a member of the staff of the APC Board gave to Robert Miller, an official of EPA, another list of each of Indiana's 92 counties,

which list purported to set forth, pursuant to 42 U. S. C. A. § 7407(d)(1), classifications as to whether NAAQS were or were not met in such respective counties on August 7, 1977, or as to whether such counties could not be so classified on the basis of available information.

(e) The list of county classifications referred to in paragraph 3(d) of these Findings of Fact and sent to EPA was set forth in a document bearing the same title and date as the list referred to in paragraph 3(b).

(f) A copy of the list referred to in paragraphs 3(d) and (e) hereof is attached to the Complaint in this action as *Exhibit 2*.

(g) With respect to whether Marion County had on August 7, 1977, attained or not attained NAAQS for the respective pollutants for which NAAQS have been promulgated under the Clean Air Act, both lists of county classifications given to EPA and referred to above contained the following classifications:

(i) Total suspended particulate matter—Primary and secondary NAAQS not attained.

(ii) Sulfur dioxide—Primary and secondary NAAQS not attained.

(iii) Carbon monoxide—Primary NAAQS not attained in central business district.

(iv) Ozone (Photochemical oxidants) — Primary NAAQS not attained.

(v) Nitrogen oxides—NAAQS attained.

4. (a) At the time the same two lists of county classifications referred to in paragraph 3 were sent to EPA, the APC Board had not directed or authorized anyone to send them to EPA.

(b) At the time the same two lists of county classifications were originally sent to EPA, the APC Board had not reviewed or approved them.

(c) Prior to the time the same two lists of county classifications were originally sent to EPA, the APC Board had not even authorized or directed that such lists be prepared.

(d) At the time the same two lists of county classifications were originally sent to EPA, no member of the APC Board had seen them.

(e) At the time the same two lists of county classifications were sent to EPA, the Management Board had not seen them, had not reviewed them, had not authorized or directed that they be prepared, and had not authorized that either list be sent to EPA as an act of the State of Indiana.

(f) At the time the same two lists of county classifications were sent to EPA, neither their contents nor their existence had been the subject of any public notice or announcement.

5. (a) By letter dated November 17, 1977, Harry D. Williams informed William E. Allis, Administrator of the Air Pollution Control Division of the City of Indianapolis, that "the state will propose to the U. S. EPA that Marion County be designated as a nonattainment area" for particulate matter, sulfur dioxide, carbon monoxide and ozone, and sent a copy of such letter to Robert Miller of EPA. Mr. Williams stated in such letter of November 17, 1977, that monitored air quality data for the year 1976 shows that Marion County is a nonattainment area for sulfur dioxide.

(b) William E. Allis wrote a member of the staff of the APC Board on November 28, 1977, stating that he did not recognize Marion County to be a nonattainment area for sulfur dioxide or carbon monoxide and requested copies of all monitoring data in 1976 for each month in which a violation of NAAQS occurred.

(c) On December 7, 1977, Mr. Allis was provided access to data showing NAAQS violations. For 1976 the only sulfur dioxide NAAQS recorded by any of the monitors in the Marion County air quality sampling network was shown to have occurred on November 28, 29, and 30 in a location in southwestern Marion County on Mann Road.

(d) Mr. Allis informed Harry D. Williams or his subordinates that the reported violations of sulfur dioxide NAAQS for

November 28-30, 1976, were erroneous and invalid because the monitoring device at the Mann Road monitoring site had been in a state of disrepair in late November, 1976.

6. (a) On December 14, 1977, the APC Board held a meeting and was informed that the list of county classifications had been transmitted to EPA.

(b) The APC Board was not advised at its December 14; 1977, meeting that William E. Allis, the head of the agency responsible for gathering the data, had repudiated the November 28, 29, 30, 1976, recorded violations of sulfur dioxide NAAQS in Marion County.

(c) At its December 14, 1977, meeting the APC Board authorized that the list of county classifications be officially submitted to EPA.

(d) Prior to ratifying transmission to EPA of the lists of county classifications, the APC Board did not take into account with respect to Marion County or any other county the matters required by IC 13-7-7-2 to be taken into account by it in adopting rules, regulations or standards.

(e) At its meeting on December 14, 1977, the APC Board also adopted and resolved to hold a public hearing on the list of county classifications and appointed H. Earl Capehart, Jr., the Chairman of the APC Board, as hearing officer.

(f) Ralph C. Pickard and Robert Miller of EPA told the APC Board on December 14, 1977, that the State was required to submit the list of county classifications in order to implement Section 107 of the Clean Air Act.

7. (a) On December 20, 1977, Mr. Allis informed Harry D. Williams that all the citations of sulfur dioxide NAAQS violations in Marion County for the period of January, 1975, through June, 1977, were erroneous. The errors cited were as follows:

> (i) A 1977 violation of the annual average standard was based on only five readings.

> (ii) A 1977 violation of the annual average standard was supposed to be based on sampling data for the period January-June, 1977, but no readings from January were included in the averaging.
>
> (iii) The only 1976 violations were the result of the broken monitor at Mann Road.
>
> (iv) A 1975 annual average was based on only 26 days of data on a continuous monitor and s, therefore, invalid.
>
> (v) A 3-hour standard violation in 1975 was indicated as a result of an error in transcribing the data.

(b) On December 23, 1977, Stephen B. Dixon, one of Harry D. Williams' subordinates, wrote William E. Allis responding to his November 28, 1977, request for data indicating NAAQS violations in Marion County. For sulfur dioxide violations, he cited only the 1975 violations and 1976 violations referred to in paragraph 7(a) above, and he cited no 1977 violations.

(c) Mr. Dixon stated in his December 23, 1977, letter that computer modeling of sulfur dioxide levels in Marion County had not been completed as of such date so that he could not supply modeling information requested by Mr. Allis.

(d) On January 13, 1978, Harry D. Williams wrote William E. Allis and acknowledged that "the computer printouts for 1975 indicated problems that did not really exist."

8. No monitored violation of a sulfur dioxide NAAQS was recorded in Marion County on August 7, 1977.

9. On January 14, 1978, Robert L. Duprey of EPA wrote to Ralph C. Pickard the letter attached to the Complaint in this action as *Exhibit 3,* stating that EPA had completed its evaluation of Mr. Williams' December 2, 1977, submittal and that:

> The designations of the State of Indiana will be those submitted by you on December 2, 1977, with the exception of those noted above (unless the problems are resolved by January 19, 1978).

10. Public notice of the public hearing held on January 17, 1978, did not appear in a newspaper of general circulation in Marion County 21 days prior to January 17, 1978.

11. (a) On January 17, 1978, a public hearing on the county attainment/nonattainment classifications was held at the offices of the Indiana State Board of Health, 1330 West Michigan Street, Indianapolis, Indiana, and H. Earl Capehart, Jr. presided as hearing officer.

(b) At the public hearing Ralph C. Pickard appeared and read into the record a statement on behalf of the Air Pollution Control Division of the State Board of Health, the APC Board, or himself, including the following:

> Quality assured sampler data were used to designate Lake, Marion, and Wayne Counties as "nonattainment" areas. Preliminary modeling studies were utilized to designate part of all of Lake, LaPorte, Marion, Porter, and Vigo Counties as nonattainment regions in accordance with U.S. EPA guidelines.

(c) At the public hearing Mr. Pickard stated that revisions or additions to the technical support document previously submitted to EPA had been developed.

(d) The revisions or additions to the list of county classifications referred to above in paragraphs 11(c) were conveyed to Robert L. Duprey or other representatives of EPA the same day, January 17, 1978. At this time the APC Board had not approved or disapproved such revisions or additions and had not authorized such matter to be sent to EPA on behalf of the State of Indiana.

(e) The record of the public hearing was held open for additional written submissions until January 20, 1978.

(f) The documents at *Exhibits 1 and 2* of the Complaint in this action ratified by the APC Board on December 14, 1977, do not contain any reference to, summary of, or detail of, modeling studies for the Marion County sulfur dioxide classification.

12. (a) On January 25, 1978, the APC Board held a meeting and Mr. Pickard reported to the APC Board that EPA Region V had already drafted for promulgation in the Federal Register, pursuant to 42 U. S. C. A. § 7407(d)(2), its classifications of Indiana counties and had on January 23, 1978, sent such classifications to EPA's headquarters in Washington, D. C.

(b) Also at the January 25, 1978, APC Board meeting Ralph C. Pickard recommended that the APC Board ratify his January 17, 1978, submission to EPA of the revisions to the list of country classifications referred to in paragraphs 11(c)-(d), and the APC Board resolved to accept such revisions.

(c) The APC Board action referred to in paragraph 12(b) occurred before the hearing officer conducting the public hearing on January 17, 1978, had reported on the hearing and before he had delivered to the APC Board any findings and recommendations.

13. (a) Also at the January 25, 1978, meeting of the APC Board, H. Earl Capehart, Jr. gave a report and recommendations as the hearing officer conducting the January 17, 1978, public hearing on the attainment/nonattainment classifications of Indiana counties, but noted that he had not completed review of all the testimony or comments submitted in written form.

(b) The minutes of the January 25, 1978, APC Board meeting, as approved by the APC Board at its March 22, 1978, meeting, show the following:

> Mr. Capehart moved that Marion and Vigo Counties be designated as unclassifiable areas and that Gibson County be designated as an attainment area with respect to the sulfur dioxide. Mr. Watson seconded, and the motion carried.

14. On February 3, 1978, Mr. Pickard received a letter from EPA in Chicago stating that it had already submitted to EPA headquarters in Washington, D. C., the list of county

classifications for Indiana and including a copy of such submittal.

15. (a) The minutes of the February 22, 1978, APC Board meeting show that at such meeting the APC Board resolved that Marion County and Vigo County be classified for sulfur dioxide as "unclassifiable" instead of as "nonattainment, in part."

(b) On March 9, 1978, a new "technical support document (dated February 22, 1978)" was sent to EPA. Such document and the March 9, 1978, letter transmitting it are attached to the Complaint in this action as *Exhibit 4*.

(c) The "technical support document (dated February 22, 1978)" as *Exhibit 4* to the Complaint in this action was not the subject of any public notice, public comment or public hearing.

(d) The technical support document (dated February 22, 1978) attached to the Complaint in this action as *Exhibit 4* and sent to EPA shows that parts of the counties of Porter, LaPorte, Vigo and Marion are shown as nonattainment areas for sulfur dioxide, which is exactly contrary to the resolutions of the APC Board adopted at its February 22, 1978 meeting.

(e) As to the sulfur dioxide classification of Marion County, the document submitted to EPA on March 9, 1978, and attached to the Complaint in this action as *Exhibit 4* reads as follows:

> The entire county with the exception of Washington Township East of Fall Creek and Franklin Township south and east of 5 Points Road and Thompson Road, should be classified as a *primary* nonattainment area. This is based on emissions and air quality data as well as preliminary modeling.

16. (a) On March 3, 1978, EPA published at 43 Federal Register 8961 *et seq.* new federal regulations pursuant to 42 U. S. C. A § 7407(d). Such new regulations, codified as 40 C. F. R. § 81.315, are attached to the Complaint herein as

Exhibit 5, and contain classifications of Marion County, Indiana, which are the same as the classifications set forth in the list of county classifications included as *Exhibits 1 and 2* of the Complaint.

(b) So much of 40 C. F. R. § 81.315 as applies to Marion County, Indiana, was based upon documents submitted to EPA purportedly on behalf of the State of Indiana and the face of such regulation shows that EPA did not substitute its own classification of Marion County for any classification submitted by officials of the State of Indiana, but adopted the classifications for Marion County set forth in the lists of county classifications as *Exhibits 1 and 2* to the Complaint herein.

17. (a) On August 15, 1974, the Secretary of State promulgated an APC Board regulation entitled "Regulation APC-22" bearing the following preamble:

> A REGULATION, pursuant to the authority found in I. C. 1971, 13-7-7-2, establishing geographical areas and classifications for different contaminant sources, (i.e. particulate matter, sulfur dioxide, photochemical oxidants/ hydrocarbons, carbon monoxide and nitrogen dioxide) from stationary sources.

(b) Although some of the specific county classifications sent to EPA under Section 107(d) of the Clean Air Act differ from those in Regulation APC-22, the latter regulation also sets forth a list of all Indiana counties and classifies each one as to whether its air quality meets or violates NAAQS for the same five pollutants as those concerned herein.

18. The Management Board never approved any of the documents, classifications, or actions of the APC Board mentioned in this action except issuance of APC-22.

19. None of the documents issued by or on behalf of the APC Board classifying Indiana counties under Section 107(d) of the Clean Air Act, 42 U. S. C. A. § 7407(d), was ever:

(a) submitted to the Attorney General of the State of Indiana for his approval as to legality;

(b) filed with the Governor of the State of Indiana;

(c) approved by the Governor[;]

(d) filed with the legislative council;

(e) filed with the Secretary of State of Indiana.

20. In issuing the lists of county classifications the APC Board did not take account of, or make any findings or other record with respect to, the existing physical conditions and the character of the areas affected; past, present and probable future uses of the area, including the character of the uses of surrounding areas; zoning classifications; the nature of the existing air quality or existing water quality, as the case may be; technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality; and economic reasonableness of measuring or reducing any particular type of pollution.

21. (a) The hearing officer presiding at the public hearing on January 17, 1978, admitted at the January 25, 1978, APC Board meeting that he had not had opportunity to read, understand, or summarize all the testimony and data presented at the hearing by the time he reported thereon at the January 25, 1978, APC Board meeting held 5 days after the record of the public hearing was closed.

(b) EPA had already completed and published its final action under Section 107 of the Clean Air Act with respect to Indiana counties before it was notified by Mr. Pickard's letter of March 9, 1978, of the content of the public hearing held January 17, 1978, and APC Board action thereon, and such final action by EPA was based upon the lists of county classifications transmitted to EPA in December, 1977.

22. (a) In point of fact the public hearing and actions of the APC Board which purported to classify Marion County and other Indiana counties under Section 107 of the Clean Air Act were meaningless formalities because such classifications were really made by staff of the APC Board and not according

to Indiana law and the classifications were issued to EPA before the hearing, and the comments delivered by the public at the hearing were not ever described to the APC Board.

(b) Because of the lack of adequate notice and hearing prior to sending the lists to EPA and because of the failure to submit such lists to the proper approving authorities, the Chamber, its members, the public affected by the classifications, and the duly elected and appointed governmental authorities with responsibility for safeguarding the interests of the public under the laws of the State of Indiana were all deprived of any meaningful opportunity to participate in development of, review the content of, or approve, the classifications as required by the law.

23. IPL and the public in Marion County have been and will be damaged by the classifications of Marion County as a nonattainment area for pollutants controlled under the Clean Air Act if such classifications are allowed to stand because of the automatic effect of the Clean Air Act upon such nonattainment areas, in that the following requirements or prohibitions, among others, are applicable to such areas:

(a) The APC Board must revise its regulations to further restrict emissions from all sources which contribute nonattainment of NAAQS. [Clean Air Act, §§ 129, 172, 173, 42 U. S. C. A. §§ 7502-7503.]

(b) No new major sources may be permitted to be built or operated, and no existing ones may be modified, in the area unless an existing source makes more than offsetting emission reductions of pollutants to which a nonattainment classification under Clean Air Act Section 107 relates. [Clean Air Act, §§ 129, 173, 42 U. S. C. A. §§ 7502-7503.]

(c) New Major sources may not be permitted to be built or operated except upon condition that they achieve the "lowest achievable emission rate" contained in any Clean Air Act implementation plan in the United States. [Clean Air Act, § 173, 42 U. S. C. A. § 7503.]

(d) Such effects and the amount of loss or damage thereby caused IPL and the public of Marion County are not susceptible of exact mathematical computation but are immediate and constitute irreparable harm to IPL and the public of Marion County. IPL is without any adequate legal remedy on the facts here found, and irreparable injury can be avoided only by the injunctive process of this court.

24. The actions of defendant herein complained of injure IPL by reducing its revenues in that its customers in Marion County will be caused to shut down or curtail operations and reduce their consumption of electric energy, and new customers will be deterred or prevented from locating within IPL's service area so that it will be unable to maintain and increase its revenues.

CONCLUSIONS OF LAW.

1. The court has jurisdiction of the parties and the subject matter of this action.

2. The lists of county classifications given to EPA in December, 1977, January, 1978, and March, 1978, constitute administrative action with respect to which plaintiff and the rest of the public affected thereby were entitled to a meaningful hearing under the Constitution and laws of the State of Indiana and the Constitution of the United States.

3. (a) The actions of the APC Board and its staff in submitting lists of county classifications to EPA, and the action of the APC Board in authorizing or ratifying the transmission of the classifications to EPA, were actions amounting to the issuance of rules creating air quality basins and issuance of classifications designed to have or having the effect of law and/or implementing statutes, namely Section 107(d) of the Clean Air Act, 42 U. S. C. A. § 7407(d); IC 13-1-1-5; IC 13-7-5-1(e); and/or IC 13-7-7-2.

(b) The actions referred to in paragraph 3(a) hereof, if legally effective, have the effect of law in that the provisions of

the Clean Air Act relating to "nonattainment area" now apply to Marion County.

4. All the actions of the APC Board and its staff in submitting documents to EPA classifying Indiana counties under Section 107(d) of the Clean Air Act, 42 U. S. C. A. § 7407(d), are properly and legally actions subject to the laws of the State of Indiana governing promulgation of rules by agencies of the State of Indiana.

5. Issuance of the lists of county classifications to EPA under Section 107 of the Clean Air Act by or on behalf of the APC Board constitute actions subject to the laws of the State of Indiana governing promulgation of rules by agencies of the State of Indiana in that IC 4-22-2-3 provides that:

> The word "rule" means any rule, regulation, standard, classification, procedure, or requirement of any agency, designed to have or having the effect of law or interpreting, supplementing or implementing any statute. . . .

6. The lists of county classifications which formed the basis for so much of the EPA regulations at 40 C. F. R. § 81.315 as pertains to Marion County were issued and promulgated in violation of IC 4-22-2-1 to 4-22-2-12, IC 13-7-7-1 to 13-7-7-4, and IC 13-1-1-4(A)(3) in that such lists were not duly approved by or filed with the proper agencies and state officials and were not the subject of public hearing or notice which accorded with the applicable requirements of the laws of the State of Indiana. Marion County has, accordingly, not been duly classified, designated, or identified as a "nonattainment area" according to the requirements of law for any purpose.

7. Unless prohibited therefrom by the injunctive process of this Court, the APC Board is required at this time by Section 129 of the Clean Air Act to apply EPA's ruling of December 21, 1976 (41 Federal Register 555524-30) (the "EPA Offset Regulation") to applications for permission to construct or operate any large new industrial facilities which emit pollutants with respect to which Marion County has been designated a nonat-

tainment area. With respect to Marion County, the EPA Offset Regulation essentially requires that no new major source of sulfur dioxide, particulate matter, or ozone may be permitted to be constructed or operated unless it demonstrates that after commencing operation, emissions of such pollutants would be less than before such source began operating.

8. Unless restrained by the injunctive process of this Court, the Air Pollution Control Board must under Sections 172 and 173 of the Clean Air Act revise the regulations in the Indiana Clean Air Act Implementation Plan limiting emissions of pollutants with respect to which a nonattainment classification is in force and controlling building of new sources of such pollutants so that they require new sources to meet the lowest achievable emission rate in any implementation plan in the United States and require existing sources including plaintiff's Marion County generating stations to install, at a minimum, "reasonably available control technology."

9. The APC Board is, and must be presumed to be, carrying out the requirements set forth in Conclusions No. 7 and 8, and imposition of such requirements will adversely affect IPL and the public of Marion County, and the loss and damage caused thereby is not susceptible of exact mathematical computation but is immediate, irreparable and continuing injury and damage. Such irreparable injury and damage can only be avoided by the injunctive process of this Court, plaintiff having exhausted its administrative remedies and being without any adequate legal remedy in the circumstances.

10. There is no genuine issue of material fact and IPL is entitled to judgment as a matter of law.

Dated this 6th day of May, 1979.

/s/ Ronald L. Gottschalk
Ronald L. Gottschalk
Judge, Hancock Circuit Court

State of Indiana }
County of Hancock } ss:

I, Shirley Riddle, Clerk of Hancock County, do hereby certify this to be a true and correct copy of Plaintiff Indianapolis Power & Light Co.'s Proposed Findings of Fact and Conclusions of Law and Entry on Motion for Summary Judgment as the same appears on record in this office in Order Book 69 Page 44.

Witness my hand and seal at Greenfield, Indiana this 11th day of May 1979.

/s/ Shirley Riddle
Shirley Riddle
Clerk of Hancock County

43 F. R. 8962

RULES AND REGULATIONS

[6560-01]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 856-5]

PART 81—AIR QUALITY CONTROL REGIONS, CRITERIA, AND CONTROL TECHNIQUES

Section 107—Attainment Status Designations

Agency: Environmental Protection Agency.

Action: Final rule.

Summary: This rulemaking sets forth the attainment status of all States in relation to the national ambient air quality standards (NAAQS). The tables following this rulemaking indicate, on a State-by-State, pollutant-by-pollutant basis, the attainment status of every area as submitted by the appropriate State agency and approved, or as designated by the Environmental Protection Agency (EPA). No distinctions are made as to the severity of the violations recorded in the areas designated as nonattainment in these tables. These designations are immediately effective. EPA is soliciting comments for 60 days and will republish revised designations as appropriate.

Dates: Effective Date: Immediately. Comments Due: May 2, 1978.

Address: General comments on these designations should be addressed to Norman L. Dunfee, Chief, Control Programs Operations Branch (MD-15), Office of Air Quality Planning and Standards (OAQPS), Research Trangle Park, N. C. 27711.

Comments relative to specific State designations should be directed to the appropriate EPA Regional Office, contact as listed below:

Tom Devine, Chief, Air Branch, EPA Region I, JFK Federal Building, Boston, Mass. 02203 (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont).

William Baker, Chief, Air Branch, EPA Region II, 26 Federal Plaza, New York, N. Y. 10007 (New York, New Jersey, Puerto Rico, Virgin Islands).

Howard Heim, Chief, Air Branch, EPA Region III, Curtis Building, Sixth and Walnut Streets, Philadelphia, Pa. 19106 (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia).

Tom Helms, Chief, Air Branch, EPA Region IV, 345 Courtland Street, NE., Atlanta, Ga. 30308 (Alabama, Georgia, Florida, Kentucky, Mississippi, North Carolina, Tennessee, South Carolina).

Jack Chicca, Chief, Air Branch, EPA Region V, 230 South Dearborn Street, Chicago, Ill. 60604 (Indiana, Illinois, Michigan, Minnesota, Ohio, Wisconsin).

Jack Divita, Chief, Air Branch, EPA Region VI, 1201 Elm Street, Dallas, Tex. 75270 (Arkansas, Louisiana, Oklahoma, New Mexico, Texas).

Art Spratlin, Chief, Air Branch, EPA Region VII, 1735 Baltimore Streets, Kansas City, Mo. 64108 (Nebraska, Iowa, Kansas, Missouri).

Robert DeSpain, Chief, Air Branch, EPA Region VIII, 1860 Lincoln Street, Denver, Colo. 80295 (Montana, Utah, North Dakota, South Dakota, Wyoming, Colorado).

Allyn Davis, Chief, Air Branch, EPA Region IX, 215 Fremont Street, San Francisco, Calif. 94105 (California, Nevada, Arizona, Hawaii, American Samoa, Northern Mariana Islands).

Clark Gaulding, Chief, Air Branch, EPA Region X, 1200 Sixth Avenue, Seattle, Wash. 98101 (Alaska, Washington, Oregon, Idaho).

FOR FURTHER INFORMATION CONTACT:

Norman L. Dunfee, USEPA, Research Triangle Park, N. C. 27711, phone 629-5226 (FTS) or 919-541-5226 (commercial).

SUPPLEMENTARY INFORMATION:

The Clear Air Act (CAA) Amendments of 1977 place additional requirements on the States and EPA. Among them, the Amendments added section 107(d), which directed each State, within 120 days after the Amendments were enacted, to submit to the Administrator a list of the NAAQS attainment status of all areas within the State. The Administrator was required under section 107(d)(2) to promulgate the State lists, with any necessary modifications, within 60 days of their submittal.

The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110(a)(2)(I) and 172 of the Act. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

The Agency recognizes, however, the importance of public involvement in the designation process. It is therefore, soliciting public comment on this rule by May 2, 1978.

Comments received will be considered carefully and revisions to the designations will be made where appropriate. The criteria used in making these designations include the following.

Air Quality Data

Section 107(d) of the CAA specified that designations should be based upon air quality levels as of enactment of the Amendments (August 7, 1977). States were required by EPA guidance to consider the most recent four quarters of monitored ambient air quality data available. If this data showed no standards violations, then the previous four quarters of monitoring data were to be examined to assure that the current indication of attainment was not the result of a single year's data reflecting unrepresentative meteorological conditions. In the absence of sufficient monitored air quality data, other evaluation methods were used, including air quality dispersion modeling.

Geographic Size

The Act specified that the designation areas could be based on air quality control regions (AQCRs) or any subportions of these areas. EPA advised States they could divide AQCRs into various nonattainment, attainment, or unclassified portions, i.e., county, subcounty, or other geographic areas as long as the area could be clearly defined in a written narrative. Additionally, a different geographic area could be used in designating the status for each pollutant.

Pollutant Specific Considerations

Subsections 107(d)(1) (A)-(E) of the CAA Amendments specified the possible categories for area designations. For both total suspended particulates (TSP) and sulfur dioxide (SO_2), an area could be designated as: (1) Not meeting the primary NAAQS, (2) not meeting the secondary NAAQS, (3) unclassifiable, and (4) attainment. For carbon monoxide (CO), photochemical O_x, and nitrogen dioxide (NO_2), designations of: (1)

Not meeting primary NAAQS, and (2) attainment/unclassified were possible. The attainment and unclassified designations for $CO/O_x/NO_2$ are combined into one column for the tables presented in this notice because both designations are set forth by subsection 107(d)(1)(E) of the CAA. No designations regarding the secondary NAAQS for these pollutants were necessary since the primary standards and secondary standards are identical.

The criteria used in designation of the status of each pollutant used in addition to ambient air quality data is discussed below:

Photochemical Oxidants

There are 105 urban areas in the United States with populations great[43 F.R. 8963]er than 200,000. The major urban areas (except Honolulu, Hawaii, and Spokane, Wash.) are where the oxidant problem is most severe. Honolulu has recorded eight consecutive quarters of data without a violations justifying and attainment designation. There is sufficient uncertaintly regarding conditions in Spokane to warrant an unclassifiable designation for the present time. The other 103 urban areas, where over 100,000,000 people reside, consistently experience photochemical oxidant levels above the NAAQS. Due to these factors, higher priority is being given in the SIP planning process to these urban areas. Of these, only six urban areas do not have oxidant ambient air quality monitoring data. The other 97 urban areas experienced oxidant violations based on ambient data. Since 97 of the 105 urban areas greater than 200,000 with monitoring data recorded violations, the six cities without data were presumed to be nonattainment for oxidants.

Additionally, a comprehensive analysis was performed by OAQPS and other factors considered by EPA for each of the six urban areas. These analyses substantiated the presumptive nonattainment designation and these areas will be required to

monitor during the 1978 oxidant season (summer-fall) to determine the magnitude of their oxidant problem.

Total Suspended Particulates

Given the spatially limited nature of TSP violations, no general area size criteria were possible. However, States were advised that designations along political boundaries such as city limits or county lines were practical from an air quality management standpoint.

The problem of designating for rural fugitive dust areas required special consideration. EPA's fugitive dust policy recognizes the generally greater health impact due to fugitive dust in urban areas in contrast to rural areas. In urban areas, the windblown soil contains various manmade toxic pollutants. But, rural windblown dust is usually not significantly contaminated by industrial pollutants. Therefore, for the purpose of these designations, any rural areas experiencing TSP violations which could be attributed to fugitive dust could claim attainment of the TSP NAAQS. Rural areas for this purpose are defined as those which have: (1) A lack of major industrial development or the absence of significant industrial particulate emissions, and (2) low urbanized population densities.

Carbon Monoxide

A designation of nonattainment for the entire urban core area of a city experiencing monitored CO violations was desirable, but smaller area designations were acceptable since CO violations are most pervasive in downtown areas of high traffic density.

Sulfur Dioxide and Nitrogen Dioxide

Generally where EPA promulgated a designation for SO_2 the minimum area was to be the county in which the violating

monitoring site was located. If States had monitoring data to substantiate the size areas they designated, they would be acceptable by EPA regardless of size.

Air Quality Control Region (AQCR) Redesignations

Section 107 of the CAA also provided for redesignation of the existing AQCR boundaries where a State determined that the redesignated areas would promote more efficient air quality management. Several States exercised this option in defining their designation areas. Part 81 under Title 40 of the Code of Federal Regulations presently contains descriptions of all existing AQCRs and these descriptions, where feasible, will be modified in a future Federal Register notice to reflect the State revisions. The exact descriptions of all AQCR boundaries are available from either the appropriate State or EPA Regional Office.

Effect of the Designations

Section 107(d)(1)(A)-(E) sets out attainment status categories to which reference is made in Parts C (Prevention of Significant Deterioration (PSD)) and D (Nonattainment) of the CAA. Section 171(2) in Part D defines "nonattainment area" to include any area identified under subparagraphs 107(d)(1)(A)-(C), while giving the Administrator authority to add other areas based on monitoring or calculations. Similarly, areas designated under subparagraphs 107(d)(1)(D) or (E) are described in section 161, Part C, as PSD areas.

The section 107(d) designations are meant to provide a starting point for States in their efforts to correct existing air quality problems and to implement programs under the 1977 CAA Amendments. For example, a designation as a nonattainment area, in general, means that an applicable SIP must be revised, pursuant to section 172, to provide for attainment of the NAAQS

as expeditiously as practicable, but not later than December 31, 1982 (December 31, 1987, under certain conditions for photochemical oxidants and/or carbon monoxide). Under section 172(b)(6) the revised SIPs must require permits, in accordance with the provisions of section 173, for the construction and operation of major new or modified stationary sources. To be approved by the Administrator under section 110(a)(2)(I), a SIP must contain a prohibition against major new source construction in nonattainment areas after June 30, 1979, where emissions from the source would contribute to increases in pollutants for which a NAAQS was being exceeded, unless the SIP meets the requirements of Part D at the time of the permit application. Under section 129 of the Amendments, EPA's emission offsets policy, as modified, continues to apply to major new source construction in nonattainment areas prior to July 1, 1979.

But the designation of an area as nonattainment or attainment must be considered only a point of departure and not a final, inflexible end in itself. The designations will have only limited significance for new source preconstruction review, for three reasons. First, new sources, wherever they proposed to locate, must be reviewed for their impact on all nearby areas as well as that in which they would locate. If an area on which a new source would impact is designated differently than the one in which it is locating, the designation of the latter would not necessarily determine the rules to which the source would be subject. Second, PSD rules apply in any area where at least one NAAQS is attained, and since virtually every area in the country shows attainment for at least one pollutant, the PSD review will be a requisite virtually everywhere. Finally, case-by-case new source review is necessitated to account for the possibility that an area with a particular designation may encompass "pockets" which do not fit that designation.

These section 107(d) designations are subject to revision under Section 107(d)(5) whenever sufficient data is available

to warrant a redesignation. Both the State and EPA can initiate changes to these designations, but any State redesignation must be submitted to EPA for concurrence. EPA will promulgate any revised list in accordance with the requirements for this initial promulgation.

EPA Review

The State submittals were reviewed by EPA for consistency with the criteria set forth in this notice. Where EPA differed with a State designation, section 107 of the CAA provides that EPA should notify the State and allow the submission of additional information. If EPA and the state could not reach agreement, an EPA designation would replace the State submitted designation. Also, in the case where a State failed to designate for any State or portion thereof the EPA would designate for the State as needed.

EPA considered all available monitoring data where it was determined to be valid. All EPA designations contained in the following tables were [43 F.R. 8964] made within the criteria contained in this notice except in a limited number of cases where the State designations were replaced by unclassifiable designations by the appropriate Regional Offices on the basis that a major source in each county was utilizing a possibly unauthorized dispersion technique. Since EPA has not finalized its tall stack policy regulations to implement Section 123, it is presently unknown whether the sources can claim full credit for their existing stacks.

EPA designations are indicated in the following tables by the asterisks accompanying the designations: * means a Federal EPA designation replaced a State recommendation. This * is used where either the designation status or the area size was modified by EPA: ** means solely a Federal designation where a State failed to submit their own recommendation. In some instances, the descriptions of the designated areas submitted by

the States were so lengthy as to prohibit their publication in the limited space available in the tables presented below. Exact descriptions of all areas designated are available at the appropriate Regional Offices or the State in question. In some of the following tables, States reference AQCRs by their appropriate number instead of their title. An Appendix A is included in the regulatory section of this rulemaking which gives both the AQCR name and number for ease of reference.

A summary of the approved designations for the 3215 counties or county equivalents covered by these designations is presented below:

	TSP	SO_2	CO	O_x	NC_2
Number of counties either totally or partially approved or designated by EPA as nonattainment	421	101	190	607	8

Dated: February 23, 1978.

DOUGLAS M. COSTLE,
Administrator.

Part 81 of Chapter I, Title 40 of the Code of Federal Regulations is amended by adding Subpart C and Appendix A as follows:

Subpart C—Section 107 Attainment Status Designations

Sec.		Sec.	
81.300	Scope.	81.309	District of Columbia.
81.301	Alabama	81.310	Florida.
81.302	Alaska.	81.311	Georgia.
81.303	Arizona.	81.312	Hawaii.
81.304	Arkansas.	81.313	Idaho.
81.305	California.	81.314	Illinois.
81.306	Colorado.	81.315	Indiana.
81.307	Connecticut.	81.316	Iowa.
81.308	Delaware	81.317	Kansas.

Sec.		Sec.	
81.318	Kentucky.	81.338	Oregon.
81.319	Louisiana.	81.339	Pennslyvania.
81.320	Maine.	81.340	Rhode Island.
81.321	Maryland.	81.341	South Carolina.
81.322	Massachusetts.	81.342	South Dakota.
81.323	Michigan.	81.343	Tennessee.
81.324	Minnesota.	81.344	Texas.
81.325	Mississippi.	81.345	Utah.
81.326	Missouri.	81.346	Vermont.
81.327	Montana.	81.347	Virginia.
81.328	Nebraska.	81.348	Washington.
81.329	Nevada.	81.349	West Virginia.
81.330	New Hampshire.	81.350	Wisconsin.
81.331	New Jersey.	81.351	Wyoming.
81.332	New Mexico.	81.352	American Samoa.
81.333	New York.	81.353	Guam.
81.334	North Carolina.	81.354	Northern Mariana Islands.
81.335	North Dakota.		
81.336	Ohio.	81.355	Puerto Rico.
81.337	Oklahoma.	81.356	U. S. Virgin Islands.

APPENDIX A—Air Quality Control Regions (AQCRs).

AUTHORITY: Secs. 107, 301 of the Clean Air Act, as amended (42 U. S. C. 7407, 7601).

Subpart C—Section 107 Attainment Status Designations

§ 81.300 Scope.

Attainment status designations as approved or designated by the Environmental Protection Agency (EPA) pursuant to Section 107 of the Act are listed in this subpart. Area designations are subject to revision whenever sufficient data becomes available to warrant a redesignation. Both the State and EPA can initiate changes to these designations, but any State redesignation must be submitted to EPA for concurrence.

[43 F.R. 8992]

§ 81.315 Indiana.

INDIANA — SO_2

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
Dearborn County			X	
Gibson County			X*	
Jefferson County			X*	
Lake County				
An area bounded by Lake Michigan on the north, the Indiana-Illinois State line on the west, U.S. 30 on the south, and the Lake-Porter County line on the east.	X			
The remainder of Lake Co.				X
LaPorte County				
An area bound in the north by Lake Michigan & the Indiana-Michigan State line, in the west by the LaPorte Porter County Line, & in the south & east by I-94	X	X		
The remainder of LaPorte County				X
Marion County	X	X		

X* EPA designations replace State designations

INDIANA — SO_2 Continued

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
Porter County				
An area bound in the north by Lake Michigan, in the west by the Lake-Porter Co. line, in the south by I-80-90 & in the east by the LaPorte-Porter County line	X	X		
The remainder of Porter Co.				X
Vigo County	X			
Warrick County			X*	
Wayne County	X			
All portions of all other Indiana Counties				X

X* EPA designations replace State designations

[43 F.R. 45993]

[6560-01]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

Subchapter C—Air Programs

[FRL 972-2]

PART 81—AIR QUALITY CONTROL REGIONS, CRITERIA, AND CONTROL TECHNIQUES

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rulemaking responds to comments and makes necessary amendments to the designations of attainment status relative to the national ambient air quality standards (NAAQS) for Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. This rulemaking supplements the national EPA rulemaking of September 11, 1978 (43 FR 40412), and incorporates by reference EPA's position on certain general issues raised in comments on the designations found in the supplementary information section of that rulemaking.

DATE: Effective date—October 5, 1978.

FOR FURTHER INFORMATION CONTACT:

Thomas Mateer, Air Programs Branch, U. S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Ill. 60604, 312-353-2334.

SUPPLEMENTARY INFORMATION: The Clean Air Act Amendments of 1977 (the 1977 Amendments), Pub. L. 95-95, added section 107(d) to the Clean Air Act (the Act) which directed each State to submit to the Administration a list of the NAAQS attainment status of all areas within the State. The

Administrator was required under section 107(d)(2) to promulgate the State lists, with any necessary modifications. For each standard, areas are classified as either not meeting the standard (nonattainment areas), meeting the standard (attainment areas), or lacking sufficient data to be classified (unclassifiable areas). The U. S. Environmental Protection Agency (EPA or the Agency) published these lists in the FEDERAL REGISTER on March 3, 1978 (43 FR 8962), and invited the public to submit comments to the Agency by May 2, 1978.

Certain issues raised in these comments were similar to those raised by others throughout the nation. These issues are addressed in the national EPA promulgation. Additional issues which are specific to the States in EPA region V are addressed in this action. Several of the comments have caused EPA to modify earlier designations. In some cases, the designation has been changed by redefining the boundaries of the area; in others, the designation itself has been changed but no new nonattainment areas have been designated in counties which were previously attainment or unclassifiable.

For good cause, the amendments to designations made final today are being made effective immediately. As discussed in the national EPA rule-making, the only effect of these designations is to identify problem areas for which State planning must be completed by a statutory deadline. These designations impose no obligation on any source. There would therefore be no point in deferring the effective date. The issues raised in the comments are discussed below by State.

* * *

[43 F.R. 45994]

INDIANA

The Agency received a total of 24 comments on designations in the State of Indiana. Also, the State of Indiana on June

12, 1978, petitioned the Agency under section 107(d)(5) of the Clean Air Act to revise the designations for several counties, in some cases revising its previous recommendations. Normally, the Agency's approval or disapproval of such a petition would be proposed as rulemaking and subsequently promulgated; however, since Indiana's petition was submitted in time to be reviewed along with all of the other comments on designations and since there is no prejudice to sources in areas where the designation is revised, the State's recommendations in the petition were reviewed and are discussed below in conjunction with all other comments on the same areas.

* * *

[43 F.R. 45995]

SULFUR DIOXIDE (SO_2)

Ten commenters requested revisions to the size of the sulfur dioxide (SO_2) primary nonattainment area in Lake County. With the exception of the State of Indiana, each commenter recommended that the city where the commenter was located be excluded from the nonattainment area, for the following reasons: Relatively few monitors within the area registered violation of the SO_2 national ambient air quality standards (NAAQS) and most of the heavy industry in the area was not responsible for the violations which were monitored. Commenters generally believed that sources unfairly placed within the nonattainment area would suffer potentially serious adverse impacts due to restrictions on economic growth and unnecessarily restrictive emission limitations.

The northern portion of Lake County, Ind., is heavily industrialized with a significant number of large SO_2 emission sources and relatively few continuous SO_2 monitors in operation. Despite the scarcity of the monitors, violations of the standard have been

monitored. For this reason, the area must remain in nonattainment area for SO_2. Also, the impact of the designation need not be adverse to emission sources not causing or contributing to violations of the standard as explained in more detail in the national EPA rulemaking.

The State of Indiana comment recommended redescription of the southern boundary of the Lake County non-attainment area (currently U. S. 30 between the Illinois State line and the Porter County line) to U. S. 30 east from the Illinois State line to the intersection of U. S. 30 and I-65, north along I-65 to the intersection of I-65 and I-94, and east along I-94 to the Porter County line. The area recommended by the State of Indiana encompasses all significant emission sources and is therefore acceptable. The southern boundary of the Lake County nonattainment area for SO_2 is revised as noted above.

Two commentors recommended that the designation for Porter County be changed from partial nonattainment for SO_2 to attainment for the full county. The State of Indiana recommended that the nonattainment area (the area bounded by Lake Michigan on the north, by the Lake-Porter County line on the west, by I-80-90 on the south, and by the La Porte-Porter County line on the east) be redesignated as unclassifiable. On June 12, 1978, the State of Indiana petitioned EPA under 107(d)(5) of the Clean Air Act, to revise the Porter County designation from attainment in part to attainment for the entire county. In all cases commenters noted that the original designation was based on computer dispersion modeling utilizing the urban version of the RAM model, rather than on monitored violations of the SO_2 air quality standards. All commenters indicated that the rural version of the RAM model would be more appropriate for use in Porter County.

Upon evaluation, EPA concurred in that assessment and the Indiana Division of Air Pollution Control remodeled Porter

County untilizing the rural [43 F.R. 45996] version of RAM. While the results of the rural RAM model showed no predicted violations of the primary or secondary NAAQS for SO_2, EPA noted certain technical deficiencies in the modeling. The modeling performed by Indiana did not utilize maximum allowable emission rates in determining whether there would be attainment of the 3-hour and 24-hour SO_2 standards, and background concentrations of SO_2 were not adequately considered. For the above reasons, we cannot concur that the State's rural RAM modeling of Porter County demonstrates attainment of the SO_2 NAAQS, however, that portion of Porter County designated as nonattainment in the March 3 promulgation will be redesignated as unclassifiable. The remainder of Porter County will remain attainment.

One commenter recommended that the portion of La Porte County designated as primary and secondary nonattainment for sulfur dioxide be reclassified as attainment. The State of Indiana recommended that Center, Scipio, Kankakee, New Durham, and Pleasant Townships and the area north and west of I-94 be redesignated as unclassifiable. On June 12, 1978, the State of Indiana formally petitioned under 107(d)(5) of the Clean Air Act for a redesignation of La Porte County from nonattainment in part to attainment for the entire county. There have been measured violations of the SO_2 NAAQS in the nonattainment portion of La Porte County and additionally, the rural RAM analysis of northern Porter County conducted by the Indiana DAPC predicted nonattainment. For the above reasons revision of the designation is not supported at the present time.

One commenter recommended reclassifying Wayne County from primary nonattainment of the SO_2 standard to unclassifiable stating that during at least one excursion, the company's electrostatic precipitators were out of service. The State of Indiana recommended changing the boundaries of the nonattain-

ment area from the full county, to Webster, Boston, Center, Franklin, and Wayne Townships only. The State's recommendation was formalized in the June 12, 1978, 107(d)(5) petition. Since electrostatic precipitators are control devices used primarily for particulate control, their breakdown would be expected to have a negligible effect on SO_2. Moreover, of the three monitored excursions of the SO_2 standard, only one occurred during a period of precipitator malfuction. Therefore the evidence supports the nonattainment designation for Wayne County, however, the recommendation of the State of Indiana to revise the geographic boundaries of the primary nonattainment area is accepted since all major sources and their areas of major impact are included in the area designated.

Four commenters recommended redesignation of Marion County from nonattainment for primary and secondary SO_2 standards to unclassifiable. Commenters challenged the validity of the monitored data which demonstrated violations of the 24-hour primary SO_2 standard and the accuracy and validity of dispersion models which predicted violations of the annual and short-term primary SO_2 standards. Upon evaluation EPA finds that the monitored data is valid and the dispersion modeling done for Marion County used an accepted model (CDM), which predicted annual violations of the SO_2 standard. These results have been supplemented by RAM runs which predicted short-term violations of the SO_2 standard. The overwhelming weight of evidence supports primary SO_2 nonattainment in Marion County and that designation will remain unchanged. Since secondary violations have been neither monitored nor predicted by dispersion modeling, Marion County is being reclassified as attainment for the secondary SO_2 standard.

One commenter recommended redesignation of Vigo County from primary SO_2 nonattainment to attainment. The commenter submitted a dispersion modeling report as evidence of attain-

ment. The State of Indiana submitted the same report with a recommendation that Vigo County be changed from primary nonattainment to unclassifiable. This recommendation was formalized in the State's June 12, 1978, petition. The modeling report disputed the appropriateness of the urban RAM model in Vigo County, recommending in its place a modified version of rural RAM. The Agency reviewed the modeling report and determined that it does not meet the Agency's modeling standards. Computer dispersion studies using acceptable modeling procedures have predicted primary SO_2 standard violations. Therefore, revision of the designation is not supported at this time.

One commenter recommended that the designation of Gibson County be revised from unclassifiable for SO_2 to attainment. The State of Indiana also requested redesignation of Gibson County from unclassifiable to attainment in its June 12, 1978, petition. The commenter submitted a modeling study of Gibson County, indicating attainment of SO_2 standards. However, a previous USEPA modeling analysis of air quality in Gibson County indicated a potential for violations of the SO_2 NAAQS. Due to the number of unanswered questions concerning air quality in Gibson County, the designation for Gibson County should remain unclassifiable.

On June 12, 1978, the State of Indiana also petitioned that Jefferson County be redesignated from unclassifiable for SO_2 to attainment. A dispersion modeling study was submitted in support of the petition. A dispersion modeling study submitted by the State to region V, USEPA, indicated violations of the secondary standard. Region V is currently preparing an analysis of Jefferson County to resolve the discrepancies between these two studies. Until that analysis is completed, the SO_2 designation for Jefferson County will remain unclassifiable for the primary standard, and will be revised to nonattainment for the secondary standard.

[43 F. R. 46008]

§ 81.315 Indiana

INDIANA — SO_2

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
Dearborn County			X	
Gibson County			X*	
Jefferson County			X*	
Lake County				
An area bounded on the north by Lake Michigan, on the west by the Indiana-Illinois State line, on the south by U.S. 30 from the State line to the intersection of I-65 then following I-65 to the intersection of I-94 then following I-94 to the Lake-Porter County line, & on the east by the Lake-Porter County line.	X			
The remainder of Lake County				X
LaPorte County				
An area bound on the north by Lake Michigan & the Indiana-Michigan State line, on the west by LaPorte-Porter County line, & on the south & east by I-94	X	X		

X* EPA designations replace State designations

INDIANA — SO_2 Continued

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
The remainder of LaPorte County				X
Marion County	X			
Porter County				
An area bound on the north by Lake Michigan, on the west by the Lake-Porter County line, on the south by I-80 & 90 & on the east by the LaPorte-Porter County line				
The remainder of Porter Co.				X
Vigo County	X			
Warrick County			X*	
Wayne County				
The area included within Boston, Center, Franklin, Wayne & Webster Townships	X			
The remainder of Wayne County				X
All portions of all other Indiana Counties				X

X* EPA designations replace State designations

5 U. S. C. § 553. Ruling making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules or agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall in-

5 U. S. C. § 553 (Cont.)

corporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.
Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

5 U. S. C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

5 U. S. C. § 706 (Cont.)

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

28 U. S. C. § 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, ch. 646, 62 Stat. 944.)

28 U. S. C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and

28 U. S. C. § 1738 (Cont.)

seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, ch. 646, 62 Stat. 947.)

42 U. S. C. § 7407. Air quality control regions

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) For purposes of developing and carrying out implementation plans under section 7410 of this title—

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the administrator.

(c) The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary

42 U. S. C. § 7407 (Cont.)

or appropriate for the attainment and maintenance of ambient air quality standards. The administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d)(1) For the purpose of transportation control planning, part D of this subchapter (relating to nonattainment), part C of this subchapter (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and twenty days after August 7, 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977—

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;

(C) do not meet a national secondary ambient air quality standard;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate.

42 U. S. C. § 7407 (Cont.)

(4) Any region or portion thereof which is not classified under subparagraph (B) or (C) of paragraph (1) of this subsection for sulfur dioxide or particulate matter within one hundred and eighty days after August 7, 1977, shall be deemed to be a region classified under subparagraph (D) of paragraph (1) of this subsection.

(5) A State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection.

(e)(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extention granted under section 7413(d)(5) of this title (relating to coal conversion) shall

42 U. S. C. § 7407 (Cont.)

cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

July 14, 1955, c. 360, Title I, § 107, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1678, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 103, 91 Stat. 687.

42 U. S. C. § 7409. National primary and secondary ambient air quality standards

(a)(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air

42 U. S. C. § 7409 (Cont.)

quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentration over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d)(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section .The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences,

42 U. S. C. § 7409 (Cont.)

one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

July 14, 1955, c. 360, Title I, § 109, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1679, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 106, 91 Stat. 691.

42 U. S. C. § 7410. State implementation plans for national primary and secondary ambient air quality standards

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for

42 U. S. C. § 7410 (Cont.)

implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that —

(A) except as may be provided in subparagraph (I), (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, in-

42 U. S. C. § 7410 (Cont.)

cluding, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding and authority to

42 U. S. C. § 7410 (Cont.)

carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which is implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any

42 U. S. C. § 7410 (Cont.)

pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after August 7, 1977) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning

42 U. S. C. § 7410 (Cont.)

stationary sources (or persons applying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revisions no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under section 7410(f) or (g) of this title (relating to temporary energy or economic authority) or orders under section 7419 of this title (relating to primary nonferrous smelters) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, extension, or variances had been granted.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 7411 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air

42 U. S. C. § 7410 (Cont.)

quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this secttion, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street

42 U. S. C. § 7410 (Cont.)

parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility preconstruction or pre-modification review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program."

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any sources which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

42 U. S. C. § 7410 (Cont.)

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 shall not be required to be promulgated before the date eight months after such date required for submission.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity

42 U. S. C. § 7410 (Cont.)

of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void on June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construc-

42 U. S. C. § 7410 (Cont.)

tion which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from

42 U. S. C. § 7410 (Cont.)

implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) In the case of any applicable implementation plan containing measures requiring—

(A) retrofits on other than commercially owned in-use vehicles,

(B) gas rationing which the Administrator finds would have seriously disruptive and widespread economic or social effects, or

(C) the reduction of the supply of on-street parking spaces,

the Governor of the State may, after notice and opportunity for public hearing, temporarily suspend such measures notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under subsection (a)(2)(I) of this section is submitted, whichever is earlier. No such suspension shall be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures (including the written evidence required by part D of this subchapter), to:

42 U. S. C. § 7410 (Cont.)

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680, and amended June 22, 1974, Pub.L. 93-319, § 4, 88 Stat. 256; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399.

42 U. S. C. § 7501. Definitions

For the purpose of this part and section 7410(a)(2)(I) of this title—

(1) The term "reasonable further progress" means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 7410 (a)(2)(I) of this title and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title.

(2) The term "nonattainment area" means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 7407(d)(1) of this title.

(3) The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

42 U. S. C. § 7501 (Cont.)

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

July 14, 1955, c. 360, Title I, § 171, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 746.

42 U. S. C. § 7502. Nonattainment plan provisions

(a)(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(I) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to to[1] the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) of this section shall—

42 U. S. C. § 7502 (Cont.)

(1) be adopted by the State (or promulgated by the Administrator under section 7410(c) of this title) after reasonable notice and public hearing;

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 7501(1) of this title) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

(4) include a comprehensive, accurate, current inventory of actual emissions from all sources as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 of this title (relating to permit requirements);

(7) identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection;

(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section;

42 U. S. C. § 7502 (Cont.)

(9) evidence public, local government, and State legislative involvement and consultation in accordance with section 7504 of this title (relating to planning procedures) and include (A) an identification and analysis of the air quality, health, welfare, economic, energy, and social effects of the plan provisions required by this subsection and of the alternatives considered by the State, and (B) a summary of the public comment on such analysis;

(10) include written evidence that the State, the general purpose local government or governments, or a regional agency designated by general purpose local governments for such purpose, have adopted by statute, regulation, ordinance, or other legally enforceable document, the necessary requirements and schedules and timetables for compliance, and are committed to implement and enforce the appropriate elements of the plan;

(11) in the case of plans which make a demonstration pursuant to paragraph (2) of subsection (a) of this section—

(A) establish a program which requires, prior to issuance of any permit for construction or modification of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed sources which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification;

(B) establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program; and

(C) identify other measures necessary to provide for attainment to the applicable national ambient air quality standard not later than December 31, 1987.

42 U. S. C. § 7502 (Cont.)

(c) In the case of a State plan revision required under the Clean Air Act Amendments of 1977 to be submitted before July 1, 1982, by reason of a demonstration under subsection (a)(2) of this section, effective on such date such plan shall contain enforceable measures to assure attainment of the applicable standard not later than July 1, 1987.

July 14, 1955, c. 360, Title L, § 172, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 746.

42 U. S. C. § 7607. Administrative proceedings and judicial review

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 7412 of this title, any standard of performance under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title) any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule or order issued under section 7420 of this title (relating to non-compliance penalties, any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, or any other final action of the Administrator under this chapter which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence

42 U. S. C. § 7607 (Cont.)

a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(d)(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,

(D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(E) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(F) promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5)

42 U. S. C. § 7607 (Cont.)

of this title (but not including order granting or denying any such orders),

(G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(H) promulgation or revision of regulations under subtitle B of subchapter I of this chapter (relating to stratosphere and ozone protection),

(I) promulgation or revision of regulations under subtitle C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(J) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(K) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(L) promulgation or revision of any regulations promulgated under sections 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(M) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement), and

(N) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

42 U. S. C. § 7607 (Cont.)

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

42 U. S. C. § 7607 (Cont.)

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later that the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

42 U. S. C. § 7607 (Cont.)

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only án objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within

42 U. S. C. § 7607 (Cont.)

the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; or

42 U. S. C. § 7607 (Cont.)

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

July 14, 1955, c. 360, Title III, § 307, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1707, and amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(a), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(c), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title III, §§ 303(d), 305(a), (c), (f)-(h), 91 Stat. 772, 776, 777; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(79), (80), 91 Stat. 1404.

Indiana Code 4-22-2-1 [60-1501]. State agencies—Promulgation of rules—Intent not to give additional authority.—It is the intent to establish a uniform method of making, promul-

Indiana Code 4-22-2-1 [60-1501] (Cont.)

gating, filing and publishing rules by all agencies of this state, to permit public participation therein and provide a method of making rules readily accessible to the public. It is not intended to give to any agency any additional rule-making power or authority and no additional or new power or authority to make or adopt rules is given to any agency by this act [4-22-2-1—4-22-2-11]. [Acts 1945, ch. 120, § 1, p. 250.]

Indiana Code 4-22-2-2 [60-1502]. Rules not promulgated and approved according to this chapter void after January 1, 1978—Compilation—Computer data base—Certification.—(a) All rules, regulations and other documents containing a statement of policy, other than official opinions of the attorney general, which the issuing agency intends to have the effect or force of law but which are not promulgated, approved and filed as rules in conformity with the provisions of this chapter, shall be invalid, void and of no force or effect after the first day of January, 1978. Official explanatory opinions of the state board of accounts based on official opinions of the attorney general are to be considered the official explanation of current law and current rules and regulations after publication in the Indiana Register until changed by legislative enactment of the Indiana general assembly or judicial decision of the Supreme Court of Indiana.

(b) Within thirty [30] days after January 1, 1978, the secretary of state shall deliver to the legislative council a copy of every rule in effect on that day according to his records. Between February 1, 1978, and January 1, 1979, the secretary of state shall deliver to the council a copy of every rule filed with his office after January 1, 1978, within thirty [30] days from the date it was filed. The council shall compile the rules according to the format and numbering system it develops under section 7.1(c) [4-22-2-7.1(c)] of this chapter and arrange for them to be converted to computer data base form. On or

Indiana Code 4-22-2-2 [60-1502] (Cont.)

before January 1, 1979, the council shall deliver to each agency a computer printout or galley proofs of the agency's rules as they are known to the council and the secretary of state. On or before March 1, 1979, the governing body of the agency shall by resolution certify to the council and the secretary of state from the printout or galley proofs those rules which are in effect on December 31, 1978. If there is no governing body, the chief administrative officer of the agency shall make the certification by affidavit. In the case of an agency that fails to make a certification as to any of its rules within the time required, the secretary of state shall examine the computer printout or galley proofs and make the certification by affidavit. After March 1, 1979, the legislative council shall arrange to have the certified rules indexed and published as the "Indiana Administrative Code."

(c) With respect to supplements to, and subsequent editions of, the Indiana Administrative Code, the executive director of the legislative services agency shall deliver an affidavit to the secretary of state attesting that the text to be published in the supplement or subsequent edition has been compared with the preceding edition, the preceding supplement (if applicable), and the appropriate original versions of recently adopted rules, and has been found to be correct and complete. Upon delivery of an affidavit under this subsection, the secretary of state shall make the certification for the supplement or subsequent edition to which the affidavit applies. [Acts 1945, ch. 120, § 2, p. 250; 1977, P.L. 38, § 1; 1978, P.L. 16, § 1; 1979, P.L. 24,, §1.]

Indiana Code 4-22-2-3 [60-1503]. Definitions.—The word "agency" whenever used in this chapter shall mean and include any officer, board, commission, department, division, bureau or committee of the state of Indiana other than courts, military officers or military boards of the state or state colleges and universities, including, but not limited to, Indiana Vocational

Indiana Code 4-22-2-3 [60-1503] (Cont.)

Technical College, and any regional institute incorporated under the provisions of IC 20-12-61[20-12-61-1—20-12-61-14] supported in whole or part by state funds.

The word "rule" means any rule, regulation, standards, classification, procedure, or requirement of any agency, designed to have or having the effect of law or interpreting, supplementing or implementing any statute, but does not include resolutions or directions of any agency relating solely to internal policy, internal agency organization or internal procedure which do not have the force of law and does not include "administrative adjudication." The word "rule" does not include a resolution adopted by the state highway commission under IC 9-4-1-125 which is designated by the commission as an emergency rule. Any such resolution is of no force and effect after ninety [90] days from the date of its adoption, unless it is later promulgated as a rule under this chapter. The word "rule" does not include a restriction or traffic control determination, by resolution of the state highway commission adopted under IC 9-4-1-125(d) or (e) or under IC 9-8-1-15, that is purely local in nature, applying only to a described intersection, or intersections, or to a described highway portion, or portions, or to a described bridge area, or areas.

"Administrative adjudication" means the administrative investigation, hearing and determination by any agency of issues or cases applicable to particular parties. [Acts 1945, ch. 120, § 3, p. 250; 1967, ch. 183, § 3[1]; 1977, P. L. 38, § 2; 1978, P. L. 17, § 1; 1979, P. L. 25, § 1.]

Indiana Code 4-22-2-4 [60-1504]. Notice of hearing—Advertising—Copies of rules—Hearing—Power to adopt additional procedures.—Before any rule is adopted by any agency it shall cause a notice to be published in a newspaper of general circulation printed and published in Marion County, Indiana, and, after July 1, 1978, in the Indiana Register, at least twenty-one [21] days prior to the date set for a hearing.

Indiana Code 4-22-2-4 [60-1504] (Cont.)

Said notice shall include a statement of the time and place of said hearing, a reference to the subject matter of the proposed rule or rules and refer to the fact that a copy of said proposed rule or rules is on file at the office of said agency where it may be examined: Provided, however, That no rule shall be invalid because the reference to the subject matter thereof in said notice may be inadequate or insufficient. At least five [5] copies of said proposed rule or rules shall be on file at the office of said agency from the date of the publication of said notice continuously until the said hearing and any interested person shall be given an adequate opportunity to examine a copy of said proposed rule or rules. Two [2] copies shall be delivered at the same time to the legislative council.

On the date set for hearing any interested party in person or by attorney shall be afforded an adequate opportunity to participate in the formulation of the proposed rule or rules through the presentation of facts or argument or the submission of written data or views. All relevant matter presented shall be given full consideration by the agency.

Any agency may adopt procedures in addition to those required by this chapter [4-22-2-1—4-22-2-12] including the holding of conferences and inviting and permitting the submission of suggestions, facts, argument and views of interested persons in advance of the drafting of the proposed rule or rules. [Acts 1945, ch. 120, § 4, p. 250; 1977, P. L. 38, § 3, p. 226.]

Indiana Code 4-22-2-5 [60-1505]. Duty to submit rules to attorney general and governor for approval—Filing with secretary of state and legislative council—Rules not effective until chapter complied with—Use of standard format and technology—Legal advisor for agencies—Effect of failure to approve within one year.—It shall be the duty of every agency which may have been or hereafter may be clothed with or given any power or authority to make, adopt, promulgate or enforce rules to

Indiana Code 4-22-2-5 [60-1505] (Cont.)

submit the same to the attorney general for his approval as to legality. Failure of the attorney general to approve or disapprove the rule within forty-five [45] days shall be deemed to constitute approval. After forty-five [45] days from the date the attorney general receives a proposed rule, the agency shall submit it to the governor for approval. The governor must approve or disapprove the proposed rule within fifteen [15] days from the date it is submitted to him by the originating agency, unless he notifies, in writing, the secretary of state that he requires additional time in which to consider the proposed rule. Upon notice to the secretary of state, the governor shall have no more than an additional fifteen [15] days in which to approve or disapprove the proposed rule. If the governor takes no action within the allowable number of days, the proposed rule will be deemed to have been approved as of the last allowable day. When approved or deemed to have been approved by the governor such agency shall file the original approved copy with the secretary of state who shall note the date and hour of such filing thereon and said agency shall also file two [2] duplicate approved copies with the legislative council. No such rule shall be effective until after compliance with the provisions of this chapter and until they have been so approved and filed and shall be effective as of thirty [30] days from the date and time filed with the secretary of state unless a later date is specified in the rule. Beginning January 1, 1979, all agencies and the attorney general's office shall use the format, numbering system, standards and techniques developed by, and the technology and equipment available at, the legislative council when drafting proposed rules. The attorney general is the legal advisor to all agencies to assist in the drafting and preparation of rules.

After December 31, 1979, any proposed rule that has not been approved by the governor within one [1] year after its initial publication in the Indiana Register, and any subsequent action on that proposed rule are void. [Acts 1945, ch. 120, § 5, p. 250; 1977 P. L. 38, § 4; 1979, P. L. 24, § 2.]

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No. 79-691

In the Supreme Court of the United States

OCTOBER TERM, 1979

INDIANAPOLIS POWER & LIGHT COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

RAYMOND N. ZAGONE
RONALD C. HAUSMANN
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The order of the court of appeals (Pet. App. A2-A11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1979. The petition for a writ of certiorari was filed on October 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed the designation by the Administrator of the Environmental Protection Agency of Marion County, Indiana, as a nonattainment area under Section 107(d) of the Clean

Air Act, after a state trial court found that the state's submission of its recommended designation to the Administrator did not comply with state law.[1]

STATEMENT

In the Clean Air Amendments of 1970 (Pub. L. No. 91-604, 84 Stat. 1676), Congress directed that the national ambient air quality standards established under Section 109, 42 U.S.C. (Supp. I) 7409,[2] be attained throughout the country by mid-1975. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975); and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). However, in considering the 1977 amendments to the Act, Congress became aware that those standards still had not been achieved in many areas of the country. This was attributed to inadequate restrictions for certain sources of pollution, insufficient enforcement of other restrictions and noncompliance by pollution sources. See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 207-211 (1977).

As a result of the widespread failure to meet the original statutory deadline, Congress, in the 1977 amendments, adopted a new regulatory approach. The first step was to identify all areas where the air quality

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[1]Petitioners present two other questions (Pet. 3), which are identical to the questions presented in the petition for a writ of certiorari in *United States Steel Corp.* v. *United States Environmental Protection Agency*, No. 79-486. For the reasons stated in our brief in opposition in that case, those questions do not warrant review by this Court. We are sending counsel for petitioners a copy of our brief in opposition in *United States Steel*.

[2]The Clean Air Act (formerly 42 U.S.C. 1857 *et seq.*) is now codified as 42 U.S.C. (Supp. I) 7401 *et seq.* See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. In this brief, citations will refer to the current codification of the Clean Air Act, as amended.

was below the applicable standards and to designate those areas as "nonattainment areas." Section 107(d)(1), 42 U.S.C. (Supp. I) 7407(d)(1). Each state was required under Section 107(d)(1) to assess its air quality and to submit a recommended list of area designations to the Environmental Protection Agency (EPA) by December 5, 1977. Pursuant to Section 107(d)(2), the Administrator of EPA was to review the information submitted by each state agency and its recommended designations and promulgate a final list, with any modifications he deemed necessary, by February 3, 1978. For the designated nonattainment areas, the 1977 amendments require that each state adopt a revised implementation plan imposing the additional pollution restrictions needed to ensure attainment of the air quality standards as expeditiously as possible. Sections 171-178, 42 U.S.C. (Supp. I) 7501-7508. Each state's revised plan is subject to EPA review and approval. Section 129(c) of Pub. L. No. 95-95, 91 Stat. 750, 42 U.S.C. (Supp. I) 7502 note.

On March 3, 1978, the Administrator published the list of area designations for the entire country. 43 Fed. Reg. 8962 (Pet. App. A52-A64). For the State of Indiana, the Administrator specified 52 separate area designations; he modified ten designations recommended by the State. 43 Fed. Reg. 8992-8993 (1978). In particular, the Administrator designated Marion County, Indiana, as a nonattainment area for both the primary and secondary sulfur dioxide standards (Pet. App. A63). This designation followed the recommendation of the Indiana Air Pollution Control Board, which based its recommendation on an analysis of air quality in Marion County performed by the technical staff of the Air Pollution Control Division of the Indiana State Board of Health (*id.* at A3-A6).

The nonattainment designations were made immediately effective without prior notice or an opportunity for comment. See 5 U.S.C. 553(b) and (d).[3] However, the Administrator solicited public comment on the designations for 60 days and committed the agency to revise the designations as appropriate in light of those comments (Pet. App. A54).

Petitioners sought judicial review of the designations in the court of appeals under Section 307(b)(1), 42 U.S.C. (Supp. I) 7607(b)(1). Thereafter, the court granted EPA's motion to stay the proceedings on appeal pending the agency's consideration of public comments with regard to its nonattainment designations. On October 5, 1978, the Administrator issued a revised list of designated nonattainment areas. 43 Fed. Reg. 45993, 46007-46008 (Pet. App. A65-A73). The Administrator determined that Marion County should be reclassified as an attainment area for the secondary sulfur dioxide standard, but, based on "[t]he overwhelming weight of evidence" (consisting of air quality monitoring data and dispersion modeling), he affirmed the nonattainment designation for the primary sulfur dioxide standard (*id.* at A70).

The court of appeals affirmed EPA's nonattainment designation for Marion County (Pet. App. A2-A11). The court rejected as untimely petitioners' contention that the Administrator's designation was based on actions by the

[3]In *United States Steel Corporation* v. *United States Environmental Protection Agency*, 605 F. 2d 283 (1979), the Seventh Circuit held that EPA had "good cause" under the Administrative Procedure Act to promulgate the designations as immediately effective. The question concerning the propriety of that action is presented in the petition for a writ of certiorari in *United States Steel Corp.* v. *United States Environmental Protection Agency*, No. 79-486. See note 1, *supra*.

state agency that did not comply with state procedural requirements, finding that petitioners had failed to raise that issue before EPA during the court-sanctioned comment period (Pet. App. A6). In addition, the court concluded that it was not bound by the determination of a state trial court that the state agency's submission of its recommended designation list to EPA did not comply with Indiana law (*id.* at A7). Moreover, the court ruled that the Administrator does not have authority under Section 107(d) to change the state's recommended designation "merely because the Indiana Air Pollution Control Board may not have complied strictly with state procedural requirements" (*ibid.*). The court noted that if the state later develops new technical information necessitating a change in the Marion County designation, the Administrator must evaluate the information and change the designation if he agrees that such a change is warranted (*ibid.*).

ARGUMENT

Petitioners contend (Pet. 7-13) that the court of appeals was required to invalidate the Administrator's designation of Marion County as a nonattainment area because a state trial court has determined that the state failed to comply with state law when it submitted its recommended designation to the Administrator. The court of appeals correctly rejected that contention, and its decision, which does not conflict with any decision of this Court or of the courts of appeals, does not warrant review.

This Court has considered at length the history and provisions of the Clean Air Act in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). The Court has found that the 1970 "Amendments reflect congressional dissatisfaction with the progress of existing

air pollution programs and a determination to 'tak[e] a stick to the States,' * * * in order to guarantee the prompt attainment and maintenance of specified air quality standards." *Id.* at 249, quoting from *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 64. The 1977 amendments reaffirm that congressional goal and establish a new regulatory scheme to remedy the past failure to achieve those standards. See pages 2-3, *supra*.

1. In arguing (Pet. 7-9) that the decision below disregards the statutory division of responsibilities between EPA and the states, petitioners fail to distinguish between the promulgation of area designations by the Administrator under Section 107(d) and his limited review of state implementation plans under Section 110(a)(2). Consequently, their reliance on this Court's decision in *Union Electric Co.* v. *EPA*, *supra*, is misplaced. Under Section 110(a)(2), 42 U.S.C. (Supp. I) 7410(a)(2), each state was free to develop its own implementation plan, and the Administrator was required by law to approve any plan that met the minimum conditions of the statute. See *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 65, 79; *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 264-265. "So long as the national standards are met, the State may select whatever mix of control devices it desires." *Id.* at 266. See *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 79. Thus, the Court in *Union Electric* concluded that challenges to a state's selection of control devices based on economic or technological infeasibility could not be presented to the Administrator but instead could only be brought before the appropriate state agency, or in state court.

This Court's construction of Section 110(a)(2) in *Union Electric* has no bearing on petitioners' claim pursuant to Section 107(d). Under Section 107(d)(1), the states were required to submit to EPA a list identifying nonattainment areas. In contrast to the narrow limits placed on the Administrator's discretion in approving or disapproving a state implementation plan under Section 110(a)(2), the Administrator had broad discretion under Section 107(d)(2) to modify the state list "as he deem[ed] necessary." The Administrator, not the states, had the ultimate responsibility for the designations, and they were promulgated solely as a matter of federal law.

Moreover, the designation of an area as nonattainment does not change the pollution control requirements of an existing implementation plan; it only triggers a state's obligation to adopt and submit a revised implementation plan. We have been informed that the State of Indiana has submitted its revised plan to EPA. Petitioners have every opportunity to raise pertinent objections to that plan before the Administrator and appropriate state authorities.[4]

2. Petitioners also contend (Pet. 10-13) that the court of appeals' refusal to follow a decision by a state trial court violates principles of collateral estoppel and full faith and credit. This contention is insubstantial. As the court of appeals correctly concluded (Pet. App. A7), state law cannot restrict the scope of the Administrator's authority under Section 107(d) to promulgate nonattainment designations. The Administrator is not empowered

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[4]This case does not raise, and hence we do not here address, the question of what effect, if any, a state court decision overturning a state implementation plan on procedural grounds would have on federal enforcement of the substantive provisions of the plan approved by EPA under Section 110(a)(2).

under Section 107(d) to reject a state's designation recommendations on the ground that the state failed to comply with its own procedural requirements in preparing and submitting the recommendations to EPA. Thus, a finding of procedural irregularity under state law is irrelevant to the validity of the Administrator's action under the federal statute.

The nonattainment designation, moreover, is subject to modification. As the court of appeals observed (Pet. App. A7), if the State of Indiana develops new technical information concerning air quality in Marion County, and submits a proposed change in the nonattainment designation for that area, the Administrator is required under Section 107(d)(5) to review the submission and make any appropriate changes in the area designation. The possibility that the nonattainment designation may be modified through administrative action provides an additional reason for denying the instant petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

RAYMOND N. ZAGONE
RONALD C. HAUSMANN
Attorneys

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